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1604 IN THE 1598

United States Circuit Court of Appeals

For the Ninth Circuit

WALTON N. MOORE DRY GOODS CO. (a corporation), J. H. NEWBAUER & COMPANY (a corporation), G. W. REYNOLDS CO., INC. (a corporation), and L. DINKELSPIEL CO., INC. (a corporation), *Appellants,* vs. A. F. LIEURANCE and PHILLIP A. HERSHEY as Receivers of R. A. Pilcher Co., Inc. (a corporation), Bankrupt, *Appellees.*	In Equity No. 5660

OPENING BRIEF FOR OBJECTING CREDITORS.

FRANCIS J. HENEY,
Rowan Building, Los Angeles,
CLARENCE A. SHUEY,
Merchants Exchange Building, San Francisco,
GRANT H. WREN,
444 Market Street, San Francisco,
Attorneys for Objecting Creditors.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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OPENING BRIEF FOR OBJECTING CREDITORS.

This is a proceeding in equity originating in the United States District Court in and for the Southern Division of the State of New York (hereinafter referred to as "Eastern Jurisdiction"), extended through ancillary proceedings into the States of California, Oregon, and Washington, and into the jurisdiction of the Southern Division of the United States District Court in and for the Northern District of California; the United States District Court, in and for the Eastern District of Washington; the United

States District Court in and for the Western District of Washington; and the United States District Court in and for the District of Oregon. These jurisdictions will hereinafter be referred to as the "Western Jurisdictions."

R. A. Pilcher Co., Inc., had been operating sixteen (16) so-called chain stores, engaged in the merchandising business and which were each and all located in the States of California, Oregon, and Washington. Its office headquarters, however, was located in New York City, and practically all its purchases for all of its stores were made through and by that office. Arthur F. Gotthold and A. F. Lieurance were originally appointed temporary Receivers in the New York jurisdiction; and shortly thereafter they were appointed temporary and ancillary Receivers in each of the western jurisdictions. Subsequently all of these appointments were made permanent.

McManus, Ernst & Ernst, a New York firm of attorneys, on behalf of the creditors of R. A. Pilcher Co., Inc., instituted the original proceedings in the New York jurisdiction, and immediately after his appointment and qualification as one of the two Receivers, they were employed by Arthur F. Gotthold to represent the Receivers.

Mr. Gotthold lived in New York City, and approximately three-fourths of the creditors in amount of indebtedness were located there.

Subsequently A. F. Lieurance who resided in Oakland, California, employed Edward R. Eliassen to act as his attorney as one of the two Receivers.

As the work progressed, an understanding between the Receivers was reached to the effect that A. F. Lieurance should direct the work of the Receivers in the western jurisdictions, and that Arthur F. Gotthold should direct the work of the Receivers in the eastern jurisdiction, and that they would cooperate as closely as possible and keep each other informed regarding matters in their respective territories.

QUESTIONS INVOLVED IN THIS APPEAL.

This is an appeal by certain objecting creditors for the benefit of all the creditors of R. A. Pilcher Co., Inc., from a judgment and decree of the United States District Court for the Northern District of California, Southern Division; and particularly from that part of its judgment and decree wherein and whereby it overruled the objections and exceptions of the appellants to the report and findings of the special master theretofore appointed therein by that court and approving, ratifying, and confirming the final accounts and reports of the Receivers therein and particularly as to the items of $10,000 paid and $769.71 ordered to be paid, respectively, to Phillip A. Hershey for alleged services as accountant; and also particularly that part of that judgment and decree which allows and fixes the sum of $35,000 as the compensation of A. F. Lieurance as one of the two Receivers in said action, and also particularly that part of that judgment and decree which allows and fixes the sum of $30,000 as compensation to be paid to Edward R. Eliassen

as the attorney for said Receiver A. F. Lieurance. It is contended by appellants that all of these allowances are excessive.

STATEMENT OF THE CASE.

R. A. Pilcher had formerly been connected in some minor capacity and as an employee and subordinate to A. F. Lieurance with the so-called chain stores of the J. C. Penney Company. A. F. Lieurance had been a stockholder in and an employee of that corporation for a period of years and had retired therefrom a few years before his appointment as Receiver herein.

When R. A. Pilcher Co., Inc., became financially embarrassed, a meeting of its creditors was called and took place in New York City. The total amount of indebtedness of R. A. Pilcher Co., Inc., at that time was approximately $725,000.00. Its assets including money in bank, merchandise, store fixtures, etc., were believed to exceed in value the total amount of its indetedness. Very shortly before that time, one or more of its stockholders had purchased additional stock to the amount of $75,000.00, and the whole of that amount was then on deposit to its credit in a New York bank. But it was then indebted to that same bank in an amount a little in excess thereof.

R. A. Pilcher represented to the creditors that he believed certain stockholders would purchase enough additional shares of stock to enable him to refinance the concern satisfactorily and continue its business,

if the creditors would agree to an extension of one year's time for the payment of their respective debts. A few attachment suits by small creditors had already been commenced and other similar suits were being threatened, and the great bulk in amount of creditors concluded that it would be advisable to have temporary Receivers appointed, until an agreement for the aforesaid extension of one year's time for the payment of debts (which they favored) could be circulated among and signed by the respective creditors for the purpose of enabling Mr. Pilcher to reorganize and refinance R. A. Pilcher & Co., Inc., as aforesaid.

Accordingly this suit was thereupon originally instituted in the United States District Court, in and for the Southern Division for the State of New York. The name of A. F. Lieurance to be appointed as one of the Receivers was doubtless suggested by R. A. Pilcher. Promptly thereafter the ancillary proceedings were taken in the states of California, Oregon, and Washington.

At the New York meeting the creditors had elected a committee to look after their affairs, and William Fraser was elected chairman of the committee, and Messrs. McManus, Ernst & Ernst acted as the legal advisors of the committee and as attorneys for the plaintiffs in the original suit, as well as for Arthur F. Gotthold, the New York Receiver.

The creditors of the western jurisdictions also appointed a committee to represent them, and Mr. Walton N. Moore of the Walton N. Moore Dry Goods Co. became the chairman of that committee as well

as a member of the original New York committee which represented all the creditors. The Walton N. Moore Dry Goods Co. was the largest western creditor. Its claim was approximately $30,000.00. It was a member of the Board of Trade of San Francisco, and Mr. Moore suggested to Mr. Lieurance at their first meeting that he thought it would be in the interest of all concerned if Mr. Lieurance as Receiver would handle the receivership in the western jurisdictions through the San Francisco Board of Trade and employ its attorneys to represent him as Receiver, and thus secure the benefit of their wide and varied experience in receivership matters. This Mr. Lieurance immediately and positively refused to do.

Instead thereof, Mr. Lieurance employed Mr. Edward R. Eliassen of Oakland as attorney for the Receivers in the western jurisdictions, and rented offices in the Central Bank Building in Oakland, California, on the same floor as and adjoining the offices of Mr. Eliassen. It is admitted by Mr. Eliassen that this was his first experience as attorney for a Receiver.

Mr. Lieurance also at once employed Mr. Phillip A. Hershey, an expert public accountant, to open a set of books and establish an accounting system and to supervise the accounts for the Receivers in the western jurisdictions. Mr. Hershey had a large amount of other business which he continued to take care of, but he established an office in one of the rooms occupied by Mr. Lieurance as Receiver, and there directed the bookkeeping and other accounting work for the Receivers in the western jurisdictions. He had assistants who aided him in all of his work.

Receiver Lieurance adopted and enforced the usual practice in chain stores of requiring all sales to be made for cash only, and of furnishing each store with blanks upon which it was required to make a daily report, and to record in the proper column on this report the daily sales, and in another column prepared for the purpose to report their local expenditures which included freight, express, light, water, heat, power, stamps, drayage, cartage, disposal of waste, salaries to employees, and other minor expenditures for local supplies such as sweeping compound, brooms, repairs to light and plumbing fixtures, and so forth. Most of these items were required to be paid for by check on their local banks where they kept a small deposit for that purpose. However, these cancelled vouchers, together with their bank statements were subject to withdrawal only by Receiver Lieurance, and were regularly collected at his general office in Oakland for the purpose of checking up the daily reports and of keeping the records and accounts of the Receivers in the office at Oakland. The managers of all stores were further instructed and required to retain in their cash drawers two hundred dollars as a revolving fund and change, and to deposit their daily sales in their local banks to the account of "R. A. Pilcher Co.—A. F. Lieurance Co.—Receiver," and to send each day to Receiver Lieurance at his Oakland office a draft for the full amount of each day's sales less the local daily expenditures, all of which were accounted for on the daily reports. The system of bookkeeping which Mr. Hershey installed at the office of Receiver Lieurance in Oakland

consisted merely of a journal and ledger for each of the sixteen stores and then a composite journal and ledger for the receivership in which the result of the other sixteen journals and ledgers were combined and compiled. The keeping of separate books for each store simplified the entire matter and made it easy for the Receiver subsequently to make a separate account for each of the fourth western jurisdictions if it had become necessary so to do. All the transactions in all the different stores were on a cash basis with the single exception of a comparatively few transfers of goods from one store to another. The system was very simple and the bookkeeping was far from being complicated or difficult. A woman bookkeeper was employed regularly by Receiver Lieurance during the entire period of the receivership, and it is admitted by both Mr. Hershey and Receiver Lieurance that she was a competent bookkeeper and able to keep those books after the system had been inaugurated by Mr. Hershey, who admits that it took him three to five days only within which to formulate and install the system. This woman bookkeeper was paid a salary of only $27.50 per week.

In the meantime, Arthur F. Gotthold, as Receiver, had employed in New York City the expert accountant firm of S. D. Leidesdorf & Co. to do similar work for the Receivers in the eastern jurisdiction. All the books of account of R. A. Pilcher Co., Inc., were in New York City and were thus made available and turned over to S. D. Leidesdorf & Co., and, as stated before, the great bulk of the creditors of R. A.

Pilcher Co., Inc., were located in the eastern jurisdiction.

The appointment of Arthur F. Gotthold and A. F. Lieurance as temporary Receivers was made by United States District Judge Augustus N. Hand on June 3, 1926, and shortly thereafter, to wit, on or about June 9, 1926, their appointment as temporary Receivers was made by the respective western jurisdictions.

Mr. Lieurance immediately proceeded to organize the conduct of the business of the sixteen stores constituting the chain. Shortly thereafter, Mr. Ernst made a visit to California and held a conference with Mr. Lieurance and Mr. Eliassen in relation to the condition and the conduct of the business and he reported back to Mr. Gotthold in New York City. An understanding was reached between the Receivers to the effect that Mr. Lieurance had assumed and would continue the direction of the actual conduct of the business in all of the stores and that Mr. Gotthold had assumed and would continue to direct all affairs connected with the receivership which might arise in the New York jurisdiction. Of course, the control of the receivership was to be joint nevertheless.

Early in the month of August, 1926, Mr. Lieurance, after conducting the business for two months only, became confident that the stores could not be operated at a profit, largely because the lease rents were too high and the number of employees too great, and that it was advisable to sell the stores as going concerns, if possible. He so told Mr. Pilcher.

On August 31, 1926, Mr. Lieurance had on hand as assets of the receivership net cash amounting to the sum of $228,178.08. At that time he reported this fact to his co-Receiver, Arthur F. Gotthold, and Messrs. McManus, Ernst & Ernst, the attorneys in New York City for the Receivers, and suggested that if the business was to be continued for an appreciable length of time, pending the refinancing of the business by the stockholders of R. A. Pilcher Co., Inc., the greater part of the cash on hand would have to be expended for merchandise to supply the stores for the coming fall season.

Receiver Gotthold and attorneys McManus, Ernst & Ernst in turn conferred with a number of large eastern creditors and Receiver Lieurance conferred with a number of the large western creditors, and it was found that the consensus of opinion among the creditors was that the business could not be refinanced and that the cash on hand should not be expended for merchandise to replenish the stocks in the stores for future operations, and that unless the stockholders of R. A. Pilcher Co., Inc., gave definite assurance that the business should be refinanced or a satisfactory settlement made, the cash then on hand should be preserved for distribution among the creditors, together with the proceeds of the sale of the remainder of the property. Also that an effort then should be made to sell the stores as going concerns.

This plan was carried out and the sale of each and all of the stores as going concerns was advertised to be and was made *as of August 31, 1926.*

Some difference of opinion arose between the two Receivers as to the best method of making the sale. Receiver Gotthold was inclined to the opinion that the highest price could be obtained by selling all the stores together as a chain; whereas Receiver Lieurance entertained the opinion that the best price and results could be obtained by selling the stores separately. The latter plan was adopted, and prospective purchasers were requested to make sealed bids for each store separately, accompanied by a certified check for a percentage of the purchase price. The bids were opened and the sales consummated from October 25 to November 3, 1926, and the aggregate gross amount received for all the stores was the sum of $257,600.00.

The stores had been conducted by the Receivers during a period of substantially five months, to wit, from June 3, 1926, the date of their appointment, to November 3, 1926, the date of sale of the last store. Of course, the conduct of the stores from August 31, 1926, until November 3, 1926, was for the direct benefit of the prospective purchasers as well as for the indirect benefit of the creditors of R. A. Pilcher Co., Inc. The purchase of additional merchandise during that period of two months was kept at a minimum and was only for the purpose of keeping the stocks of the various stores properly balanced.

Shortly after this suit was originally commenced in the New York jurisdiction to procure the appointment of temporary Receivers, it was deemed necessary for the creditors to cause, and they did cause,

bankruptcy proceedings to be instituted against R. A. Pilcher Co., Inc., in New York City in order to destroy prior liens of a number of small attaching creditors in the various jurisdictions. Afterwards it was concluded by all parties concerned therein, however, that it would be equally economical and more advantageous to the creditors of R. A. Pilcher Co., Inc., to keep the administration and liquidation of its affairs through the receivership already in existence instead of transferring its operation to the bankruptcy court and thus to a receiver or trustee to be appointed therein. Hence, no further steps were ever taken by the creditors to pursue the bankruptcy proceedings.

Amount Available For Creditors, etc.

The net amount of money obtained by the Receivers from the liquidation of all the assets of the receivership and which thus became available for the payment of creditors after there should first be deducted therefrom the fees for the Receivers and their attorneys and other necessary expenses of the receivership was the sum of $466,980.40.

The total amount of general claims filed with the Receivers was $746,043.75; and the total amount thereof which was allowed by them was $718,794.12.

The total amount of preferred claims filed with and allowed by the Receivers was $5,816.34, and these were all paid in full by the Receivers.

Unnecessary Trip of Mr. Hershey to New York City.

The books of R. A. Pilcher Co., Inc., which as before stated were all kept in the City of New York,

had been permitted to lapse on the 28th day of February, 1926, or in other words, had not been kept up to date subsequent thereto and prior to the appointment of the Receivers on June 3, 1926.

After the sale of the stores had been consummated, to-wit, after November 3, 1926, Receiver Lieurance sent Mr. Hershey to New York City for the avowed purpose of checking up the correctness and amount of claims of creditors of R. A. Pilcher Co., Inc., who were entitled to participate in the receivership assets. Receiver Lieurance then knew that the books and records of R. A. Pilcher Co., Inc., relating to this matter had been for some time in the hands of a firm of accountants who had been employed by Receiver Gotthold, to-wit, the firm of S. D. Leidesdorf & Co., and that the great bulk of creditors were located in and around New York City. Mr. Hershey was away from Oakland on this trip during a period of a total of thirty-eight days, and while in New York City he worked with S. D. Leidesdorf & Co. in their offices upon the books and records of R. A. Pilcher Co., Inc., for the sole purpose just hereinbefore stated.

Compensation of Receivers and Their Attorneys.

The following telegraphic and letter correspondence between the parties in interest explains quite fully the manner in which the amount allowed by the trial court as fees to Receiver A. F. Lieurance and his attorney, Edward R. Eliassen, was reached:

"New York, N. Y., 1125A Dec. 6, 1926.
A. F. Lieurance, 1201 Central Bank Oakland, Calif.

We are applying today for order declaring dividend forty per cent, and also for allowances

on account to receivers and ourselves. This is without prejudice to and cannot jeopardize your application in West for allowances to ancillary receivers and Eliassen.

McManus, Ernst & Ernst. 901A."

(Transcript of Record, Vol. I, page 328.)

"New York, N. Y., 722P Dec. 7, 1926.

A. F. Lieurance, Esq., Central Bank Bldg., Oakland, Calif.

Order entered today by Judge A. N. Hand as follows:

'This cause having duly come on to be heard on this seventh day of December, 1926, on the third report and petition of the receivers herein, and after hearing Irving L. Ernst, Esq., of counsel for the receivers, now, on motion of McManus, Ernst & Ernst, attorneys for the receivers, it is hereby ordered and decreed, First: that all debts entitled to priority for which proofs of claim have been filed where such proofs of claim are necessary, be paid in full. If the receivers doubt the validity of any priority claims filed, the validity of such claims will be determined in the manner hereinafter set forth. Second: that a first dividend of forty per cent be declared and paid to all creditors whose claims have been filed and allowed by the receivers herein, and the receivers are hereby authorized to accept proofs of claim in due form from creditors whose claims appear on the books of the defendant to be valid, notwithstanding that the time limited for such filing has expired. Third: Michael J. Cardozo, Esq., is hereby appointed special master to hear the objections filed by the receivers to any and all claims filed, or that may hereafter be filed and to take the testimony offered by the parties, and to report the same to this court, with his opinion thereon.'

At request Creditors' Committee no allowances were fixed for receivers or counsel until receiving some indication from you what aggregate amount you and Eliassen will request from Western

jurisdictions. Will you please wire use approximately what aggregate allowances will be so requested.

McManus, Ernst & Ernst. 523 PM."

(Transcript of Record, Vol. I, pages 328-330.)

"Seattle, Wash., Dec. 8, 1926.

A. F. Lieurance, 1401 Central Bank Bldg., Oakland, Calif.

William Frazer, Chairman Creditors' Committee wants my views by wire on full and final compensation for Ernst, Gotthold, Eliassen and yourself. Judge Hand has asked for our views and suggestions. Please wire me amounts you and Mr. Eliassen expect.

A. V. Love. 420A Dec. 9."

(Transcript of Record, Vol. I, page 330.)

"Oakland, California, December 8, 1926.

McManus, Ernst & Ernst, 170 Broadway, New York City, N. Y.

Replying to your telegram December 7th. No amount on account for attorneys and receivers in ancillary jurisdiction will be suggested by us. However, will ask for allowances on account, but amounts will be left entirely to discretion of courts. Feel this best and most fair method to pursue. Have not slightest idea of what courts will do, but feel they will be fair to both creditors and ourselves.

A. F. Lieurance."

(Transcript of Record, Volume I, page 331.)

"New York, N. Y., 1051A Dec. 8, 1926.

A. F. Lieurance, 1401 Central Bank Bldg., Oakland, Calif.

I shall be glad to know your views as to allowances to receivers and counsel as soon as possible.

Arthur Gotthold. 806A."

(Transcript of Record, Vol. I, page 332.)

"Dec. 8th, 1926.

Mr. Walton N. Moore,
c/o Walton N. Moore D. G. Co.,
San Francisco, Cal.

Judge Hand last evening signed order directing receivers to pay creditors forty per cent STOP Receivers applied for partial allowance Ten Thousand to be equally divided STOP Ernst applied for partial allowance of Ten Thousand STOP Judge Hand invited suggestions from Committee After consultation we told him that without knowing what allowance Lieurance and his counsel would seek in Western jurisdiction Committee was not in position to make recommendation STOP Ernst tells us that he expects to apply for similar amount in final payment STOP What is your opinion on Ernst & Gotthold claims We feel Lieurance should not receive New York compensation unless figured in amount to be received on Coast STOP Please get in touch with Love see Lieurance and Eliassen find out if possible what charges will be STOP Advise results by wire because we want to include your views in recommendation to Judge Hand.

William Fraser."

(Transcript of Record, Vol. II, pages 461-462.)

"Dec. 9, 1926.

William Fraser,
c/o New York Credit Men's Assn.,
320 Broadway, New York City, New York.

Talked to Lieurance long-distance today. He will not suggest amount of fees. Says will be satisfied with courts order. Think Lieurance's compensation should be greater than Gotthold's, as he has done most of work. Think Ernst suggested fees altogether unreasonable, and that all parties should be satisfied with reasonable fees.

A. V. Love."

(Transcript of Record, Vol. I, page 334.)

"New York, N. Y. 1112A Dec. 9, 1926.
A. F. Lieurance, 1401 Central Bank Bldg., Oakland, Calif.

Suggested interim allowances in New York are ten thousand to receivers to be divided equally. Ten thousand to New York counsel. New York counsel to make no application in ancillary jurisdictions. Figures indicated are satisfactory to court and generally to creditors, but before payment is made we hoped to get some estimate of total allowances so that figure might be kept down to reasonable amount.

Arthur F. Gotthold. 845a."

(Transcript of Record, Vol. I, page 337.)

"December 9, 1926.

William Fraser
c/o J. P. Stevens Co.,
23 Thomas Street, New York City.

Further answering your telegram. Receiver Lieurance and attorney intend having each ancillary Western court also order dividend forty per cent. To avoid possible conflict between Eastern and Western Courts as to amounts of allowances to receivers and their attorneys, as Chairman of Creditors' Committee here and member of New York committee, I earnestly request that question of such allowances be deferred for time being, until receivers and attorneys and committees can exchange views and come to some agreement concerning gross amounts to be asked for. Amounts of allowances to receivers and attorneys at this time by Judge Hand may prove unsatisfactory to ancillary courts who may order different amounts resulting in confusion. As you now know from yesterday's telegrams from Lieurance to Gotthold and attorneys McManus and Ernst, receiver Lieurance and attorneys in ancillary jurisdiction intend leaving amounts of allowances to discretion of ancillary courts.

Walton N. Moore."

(Transcript of Record, Vol. I, page 335.)

December 10, 1926.

Mr. Wm. Fraser,
c/o J. P. Stevens & Company,
23 Thomas Street,
New York City, N. Y.

Dear Sir:

I arrived yesterday from New York and your telegram of the 8th received the previous day was called to my attention. Very soon thereafter I was called over the telephone by Mr. Lieurance who with his attorney desired a conference with me. I therefore telegraphed you a day message advising you of the receipt of your telegram and stating that I would more fully answer it by night-letter after the conference. This I did, as per carbon copy herewith enclosed.

It is a difficult matter for me to reach any conclusion of my own as to what would be a fair compensation to the receivers and their attorneys in the Pilcher case. What contact I have had with it with the New York attorneys involved has left me with the impression that it will be their desire to get every dollar that the court and the creditors will allow them to take. I do not think that it now is the time to fix the final compensation and in as much as nearly all of the work has been done in the ancillary jurisdictions it seems to me that the judges of these courts are better able to determine the value of the services rendered than Judge Hand could be.

I had a conference yesterday with Lieurance and his attorney, Eliassen, together with the attorney of the San Francisco Board of Trade. I was impressed with the fairness of Lieurance's attitude. He expressed a willingness to submit the entire matter to the judges of the ancillary courts to fix the fees. Nearly all of the work has been done out here where the property was located and the results produced by Lieurance have been very creditable. It seems to me that a statement of facts might be prepared by the attorneys of Mr. Lieurance for submission to each of the ancillary courts, which could have the approval

of the creditors as to its correctness, which could be submitted to each of the courts with the request that the judges thereof fix the compensation for the work done in his jurisdiction. When these allowances have been made, the whole could then be submitted to Judge Hand with a similar statement and he can then make such additional allowance, if any, as he thinks proper. I am in hopes that correspondence between the receivers and the attorneys may result in some mutual understanding which will avoid conflict, giving them what is their just due and no more.

Very truly yours,
Chairman of the Board.

WNM/WH."

(Transcript of Record, Vol. II, pages 466-468.)

"New York, Dec. 9th, 1926.

Mr. Walton N. Moore,
c/o Walton N. Moore D. G. Co.,
San Francisco, Cal.

Dear Mr. Moore:

We sent you telegram as per enclosed copy relative to the desire of the receivers to be paid $10,000 as a partial allowance in New York City, which sum we are advised, has been agreed by the receivers should be equally split with the understanding that any allowance that Lieurance gets in the West should be likewise equally divided.

Mr. Ernst also made application for a partial allowance of $10,000.00, and in answer to a question of one of the Committee members stated that this was predicated on a further application and final allowance later on of $10,000.00 more.

The Committee does not know how to advise Judge Hand because we do not know what will be the amount of the similar expenses in the West. We do think in both instances the amount asked for is too high. We, furthermore, do not feel that Lieurance should be counted in the fee in New York unless any amount he receives here

should go towards reducing his claim in the Western Jurisdiction.

As a spokesman for the Committee I told the Judge that the Creditors Committee wanted to be fair, and felt that both the receivers and their counsel should receive compensation commensurate with the work that they had done. Judge Hand, himself, apparently feels that he has not enough information along the lines just suggested, regarding the possibility of Lieurance and Eliassen's fees, to enable him to act in the manner in which he would like to do.

Ernst told me over the telephone yesterday that he had received a wire from Lieurance stating that as far as he was concerned he did not intend to ask for any definite amount of compensation, but intended to leave it absolutely to the fairness of the Judge. I do not feel that I wish to criticize Mr. Lieurance's attitude because I have a very high regard for his ability and other qualities about which I have been so favorably informed, but I do feel that he should appreciate the Committee's situation and their desire to be of service not only to the Court, but to the creditors as well. He might very suitably go into this matter with you and Mr. Love and arrive at some definite conclusion, which will help us to properly fulfill our obligations to Judge Hand.

It is not usual for a Judge in Judge Hand's position to ask for recommendation from the Creditors Committee. He is under no legal obligations to do so, and in fact in this and other jurisdictions it is most unusual for a Judge to permit the Creditors Committee to have any hand in the proceedings by which he reaches his ultimate decision.

We, therefore, feel that if Mr. Lieurance knew these circumstances and gets the proper picture of the sympathetic attitude of the New York members of the Creditors Committee, that he will be willing to proceed along the lines which I have indicated in this letter and in my telegram.

I would also like very much to have you express yourself very fully regarding the fees which have been asked for, both by the co-receivers and by Mr. Ernst. While we wish to be fair, we think they are too high.

Will you please give me the benefit of your advice in the situation?

Sincerely yours,

Enc. Wm. Fraser."

(Transcript of Record, Vol. II, pages 468-470.)

At the meeting in Mr. Kirk's office, it was unanimously agreed among Receiver Lieurance, Attorney Eliassen, Walton N. Moore, and Joseph Kirk that the amount mentioned for attorneys' fees and Receiver fees respectively in the application of Messrs. McManus, Ernst & Ernst in the court of original jurisdiction in New York was excessive. On the morning of the following day, to-wit, on December 10, 1926, Receiver A. F. Lieurance and his attorney, Edward R. Eliassen, appeared before Judge A. F. St. Sure in the United States District Court in San Francisco and *ex parte* secured an order which contained among other things the following provisions:

"That Edward R. Eliassen, attorney for the receivers, be paid immediately the sum of $10,000 to apply on account of services rendered. That the sum of $10,000 be paid to apply on account of receivers' services; to be divided seventy-five per cent thereof to Receiver A. F. Lieurance and twenty-five per cent thereof to Arthur F. Gotthold, his co-receiver."

The foregoing telegram, dated December 9, 1926, from Arthur F. Gotthold to A. F. Lieurance was either shown to Judge St. Sure or else its substance was stated to him by Mr. Eliassen at the hearing; and

in addition thereto, Mr. Lieurance testified regarding the character and quality of their services. Judge St. Sure was not then informed, however, by either of them that the amount of attorneys' fees ($10,000.00) applied for by the New York attorneys in that jurisdiction was considered excessive or too large by them and by Walton N. Moore, the chairman of the western committee, and by Joseph Kirk, the attorney for the Board of Trade, or any of them. And neither was he then informed that Judge Hand had been requested by the New York Creditors Committee to reserve his decision and order in the matter until they could inform him as to the aggregate amount of fees which would be requested by Receiver Lieurance and his attorney, Mr. Eliassen in the western jurisdictions. Neither was the attention of Judge St. Sure called to the fact that the gross sales over the counter in the California stores was $76,154.73 and that the gross amount received from the sale of the California stores was $41,000.00, thus making a total of $117,154.73, and he was not then informed by either of them that Receiver A. F. Lieurance entertained the opinion and belief that a commission of five per cent on the gross sales (including turnovers) of the various stores would be adequate compensation for him as receiver, and that this would amount to only $5,857.73 for the California stores which were all within the jurisdiction of Judge St. Sure. This opinion and belief of Receiver Lieurance was testified to by him in each of the other jurisdictions and was acted upon favorably by the respective judges therein, but that opinion and belief was not expressed by Receiver Lieurance

at the conference with Walton N. Moore, Joseph Kirk, Mr. Eliassen and himself at the offices of the Board of Trade in San Francisco on the afternoon of December 9, 1926, nor was it expressed by or for him to anyone in response to any of the inquiries from New York regarding the aggregate amount of fees which he desired and hoped to secure for himself in the western jurisdictions, or otherwise, or at all.

The action of Judge St. Sure in the matter was not communicated by either Receiver Lieurance or his attorney, Mr. Eliassen, to Walton N. Moore, Joseph Kirk, McManus, Ernst & Ernst, his co-receiver, Arthur F. Gotthold, or any other person except the respective judges in the other western jurisdictions as and when application was made to each of them for an order allowing *ad interim* receiver and attorney's fees as just hereinafter stated.

At six p. m. on December 10, 1926 (the day upon which Judge St. Sure had made the foregoing order), Receiver A. F. Lieurance sent the following telegram to his co-receiver Arthur F. Gotthold, to-wit:

> "Oakland, California, December 10, 1926.
> Mr. Arthur F. Gotthold,
> Joint Receiver, R. A. Pilcher Co., Inc.,
> #27 William Street, New York City, N. Y.
> I purposely delayed replying to your telegram of December ninth, requesting aggregate amount of fees to be allowed attorneys and receivers pending result of meeting with San Francisco Board Trade and Walton Moore, held late yesterday afternoon in San Francisco. As previously stated Eliassen and myself feel in fairness to creditors, attorneys and receivers, matter of compensation should be left entirely to courts without suggestion or recommendation on our part as

to amounts. This plan will be followed in ancillary jurisdictions, and is supported by Walton Moore, A. V. Love and San Francisco Board Trade. Their views and recommendations in this record were communicated to Mr. Fraser yesterday, by wire, in reply to his request to them for same, as Judge Hand had evidently asked Creditors Committee for recommendations as to aggregate allowances to be made attorneys and receivers. In view of fact that fixation of fees and compensation will be left to courts in Western jurisdictions, it is impossible for me to even guess at amounts which will be allowed. It has been suggested here, and evidently at New York also, that you receive your compensation in parent jurisdiction, and I look to courts in ancillary jurisdiction for my compensation. There is no doubt this will simplify matters and keep aggregate amount to be allowed down to reasonable figure, as was suggested at yesterday's meeting. However, no one can foretell how this will work out. Please let me have your views regarding this arrangement. Application for orders to pay forty per cent dividend and allowances on account will be made in Northwest next week.

A. F. Lieurance."

(Transcript of Record, Vol. I, pages 338-339.)

It will be observed that this telegram, although sent from Oakland at six o'clock in the evening on December 10th, fails to inform the co-receiver of the fact that the United States District Court at San Francisco had made its order that morning awarding $7,500.00 to Receiver Lieurance and $2,500.00 to Receiver Gotthold as *ad interim* fees; or that it had also at the same time made its order allowing Edward R. Eliassen the sum of $10,000.00 as *ad interim* attorney's fees in that jurisdiction. The full significance of this omission will appear later herein.

That same night Receiver Lieurance and his attorney, Mr. Eliassen, left on the train for Spokane, Washington, and on December 14, 1926, shortly after their arrival there, they presented an application to the United States District Court for the Eastern District of Washington for an order granting *ad interim* receivers' fees and attorneys' fees. They informed Judge Webster, who presided there, as to the amount theretofore allowed on December 10 by Judge St. Sure, and Mr. Lieurance testified that five per cent upon the gross sales (including turnovers) in that jurisdiction would be a fair and reasonable compensation for the services of the receivers in that district. He also testified as to the character and value of the services performed by himself and his attorney, Mr. Eliassen, respectively. Thereupon, Judge Webster, presiding, made an order allowing $5,000.00 as *ad interim* receivers' fees in that district with the division thereof between the two Receivers to be determined by him when the final account of the receivers came up for hearing. Judge Webster also then made an order awarding attorneys' fees in the sum of $2,500.00 to attorney Edward R. Eliassen. Then Receiver Lieurance and his attorney, Mr. Eliassen, went to Seattle, Washington and in the afternoon of December 15, 1926, they applied to the United States District Court for the Western District of Washington for an order allowing *ad interim* receivers' fees and attorneys' fees, and again Mr. Lieurance testified in substance that in his opinion he ought to be paid a commission of five per cent. upon the gross sales of merchandise made in that jurisdiction

(including of course, the bulk sale of the stores), and thereupon Judge Neterer made an order allowing $12,000.00 to A. F. Lieurance for *ad interim* receivers' fees and $1,000.00 to Arthur F. Gotthold as *ad interim* receiver's fees in that jurisdiction.

On the morning of December 15, and before testifying so as aforesaid, Mr. Lieurance had received a telegram from his secretary, Mary L. Raeburn, who was located at his Oakland office, which reads as follows:

> "Wire just received from Gotthold. 'Regret we have had no further word in answer our telegrams and Fraser's letter. Further answering your telegram December tenth. It has not been suggested here that I receive allowance in New York only. I am informed you and Mr. Walter Ernst agreed both of us to apply for allowances in New York and also in each of ancillary jurisdictions in event that separate applications should be made. We are asking Judge Hand for a hearing on Friday reference interim allowances. Shall be glad to know your views before that time.' "
>
> (Transcript of Record, Vol. I, page 341.)

After the allowances had been secured in Seattle on the afternoon of December 15, 1926, Receiver Lieurance caused his Oakland office to send a telegram from there over his signature to his co-Receiver Arthur F. Gotthold in New York which reads as follows:

> "Replying your wire December 15, I have received no letter from Mr. Fraser, neither did I write to him. No agreement has been made between Walter Ernst and myself regarding receivers' compensation. As wired you December 10th the suggestion was made that you take all

of the allowance made in New York and I take allowance to be made here in West. This is I believe fair and equitable. Does this plan meet with your approval?"

(Transcript of Record, Vol. I, pages 342-343.)

Again Receiver Lieurance conceals from his co-Receiver Gotthold the fact that *ad interim* allowances have already been made to each and both of them at San Francisco, Spokane, and Seattle, and that he is about to apply at Portland, Oregon, for an additional allowance to each and both of them on the following day. Moreover, this reply telegram was caused by him to be sent from his Oakland office instead of sending it directly from Seattle, and the natural consequence thereof was that his co-Receiver Gotthold inferred that no application for either Receivers' or attorneys' fees had yet been made in any one of the western jurisdictions.

The aforesaid telegram of December 15, 1926, from Gotthold to Lieurance was received at the Oakland office of Lieurance at 9:35 a. m. of that day and was promptly repeated by his secretary to him at Seattle. The reply of Lieurance to Gotthold which bears the same date, to-wit, December 15, 1926, was sent as a night lettergram and in due course would have been delivered to Receiver Gotthold's office at about eight o'clock on the morning of December 16.

At the hour of 11:43 a. m. on December 16, 1926, Receiver Gotthold sent his reply to the Oakland office of Receiver Lieurance and it reached there at 9:44 a. m., and it is a fair legal presumption that it was promptly repeated to Mr. Lieurance at Portland,

Oregon, by his Oakland secretary, and consequently that Mr. Lieurance received it at Portland some time before two o'clock p. m. on December 16, 1926, and hence, prior to the hearing before Judge Bean in the United States District Court of Oregon, which occurred after 2:00 p. m. The aforesaid telegram from Receiver Gotthold to Receiver Lieurance reads as follows:

> "Replying your wire December fifteenth, Fraser's letter should have reached you. My information regarding allowances came from Mr. Walter Ernst. I regret misunderstanding. Your suggestion as to allowances acceptable to me, but I hope that aggregate of allowances will be kept to reasonable figure. Hearing before Judge Hand set for afternoon of December seventeenth. Will submit matter to him then."
>
> (Transcript of Record, Vol. I, pages 344-345.)

At the hearing before Judge Bean, Receiver Lieurance again testified that five per cent. upon the gross sales (including the bulk sale of the stores in that jurisdiction) would be fair and reasonable compensation for him as Receiver, and Mr. Eliassen informed Judge Bean regarding the action which had been taken in the matter of the *ad interim* allowances and fees to the Receivers and himself by Judge St. Sure at San Francisco, and the court at Spokane, and the court at Seattle. He also had informed the judge at Seattle regarding the action of Judge St. Sure and the action of the judge at Spokane. Judge Bean was not informed, however, by either of them that an agreement had been entered into between Receiver Lieurance and Receiver Gotthold by and under which Receiver Lieurance was to obtain all of the allowances

for Receivers' fees which had been or might thereafter be made to Receiver Gotthold at San Francisco, Spokane, Seattle, and Portland.

Thereupon Judge Bean made an order allowing *ad interim* fees of $13,500.00 to Receiver Lieurance, and of $1,000.00 to Receiver Gotthold. Mr. Lieurance had testified before Judge Bean in substance that in his opinion the only fair way to compensate him was to pay him on the percentage basis of five per cent., which was the least he should be paid. (See testimony of Edward R. Eliassen, Transcript of Record, Vol. I, page 327.)

In the meantime, and on December 15, 1926, Mr. Walton N. Moore had received a letter from Mr. William Fraser, the chairman of the general creditors' committee which is dated December 9, 1926, and was written in reply to the telegram of the same date which had been sent to him by Mr. Moore as it had been formulated by Mr. Kirk with the aid of Mr. Moore, Mr. Lieurance, and Mr. Eliassen in conference on that subject as hereinbefore stated. The reply letter from Mr. Fraser to Mr. Moore reads as follows, to-wit:

> "We sent you telegram as per enclosed copy relative to the desire of the receivers to be paid $10,000.00 as a partial allowance in New York City, which sum we are advised, has been agreed by the receivers should be equally split with the understanding that any allowance that Lieurance gets in the West should be likewise equally divided.
>
> Mr. Ernst also made application for a partial allowance of $10,000.00, and in answer to a question of one of the Committee members stated that this was predicated on a further application for

an additional and final allowance later on of $10,000.00 more.

The Committee does not know how to advise Judge Hand because we do not know what will be the amount of the similar expenses in the West. We do think in both instances, the amount asked for is too high. We, furthermore, do not feel that Lieurance should be counted in the fee in New York unless any amount he receives here should go towards reducing his claim in the Western Jurisdiction.

As a spokesman for the Committee I told the Judge that the Creditors Committee wanted to be fair, and felt that both the receivers and their counsel should receive compensation commensurate with the work that they had done. Judge Hand, himself, apparently feels that he has not enough information along the lines just suggested, regarding the possibility of Lieurance and Eliassen's fees, to enable him to act in the manner which he would like to do.

Ernst told me over the telephone yesterday that he had received a wire from Lieurance stating that as far as he was concerned he did not intend to ask for any definite amount of compensation, but intended to leave it absolutely to the fairness of the Judge. I do not feel that I wish to criticise Mr. Lieurance's attitude because I have a very high regard for his ability and other qualities about which I have been so favorably informed, but I do feel that he should appreciate the Committee's situation and their desire to be of service not only to the court, but to the creditors as well. He might very suitably go into this matter with you and Mr. Love and arrive at some definite conclusion, which will help us to properly fullfil our obligations to Judge Hand.

It is not usual for a Judge in Judge Hand's position to ask for recommendation from the Creditor's Committee. He is under no legal obligations to do so, and in fact in this and other jurisdiction it is most unusual for a Judge to permit the Creditors Committee to have any hand

in the proceedings by which he reaches his ultimate decision.

We, therefore, feel that if Mr. Lieurance knew these circumstances and gets the proper picture of the sympathetic attitude of the New York Members of the Creditors Committee, that he will be willing to proceed along the lines which I have indicated in this letter and in my telegram.

I would also like very much to have you express yourself very fully regarding the fees which have been asked for, both by the co-receivers and by Mr. Ernst. While we wish to be fair, we think they are too high.

Will you please give me the benefit of your advice in the situation?"

(Transcript of Record, Vol. II, pages 468-470.)

Promptly after he had read the foregoing letter, Mr. Moore endeavored to reach Mr. Lieurance on the telephone at the latter's Oakland office and thus learned from someone therein who answered the telephone that Mr. Lieurance and Mr. Eliassen had gone north. This information aroused a suspicion in the mind of Mr. Moore as to what the purpose of their trip might be, and he immediately took Mr. Fraser's letter to Mr. Kirk and told him that he had just learned that Mr. Lieurance and Mr. Eliassen had gone north. Mr. Moore expressed the fear that they had gone for the purpose of making an application of Receivers' and attorneys' fees. Upon inquiry they learned from the office of Mr. Lieurance that he and Mr. Eliassen were at the Hotel Washington, Seattle, on that day and thereupon Mr. Kirk, at the request of Mr. Moore, sent them a telegram reading as follows:

"In view of communication received by Walton Moore from Fraser, chairman New York Cred-

itors Committee, it is highly desirable that you should not apply for receivers allowances or attorneys fees in western jurisdictions until whole subject matter can again be discussed here upon your return."

(Transcript of Record, Vol. II, page 473.)

This telegram was received by Messrs. Lieurance and Eliassen December 15, 1926, on the train while en route to Portland, Oregon. It had been forwarded to them from the Hotel Washington at Seattle and was in their possession at the time they made their application before Judge Bean for *ad interim* Receivers' and attorneys' fees.

After completing their application before Judge Bean and on the same day, to-wit, December 16, 1926, Receiver Lieurance sent a telegram to Walton N. Moore at San Francisco which reads as follows:

"Work completed here this morning STOP Orders obtained all jurisdictions pay forty per cent dividends STOP Allowance to attorney California ten thousand Spokane twenty-five hundred Seattle five thousand Portland ten thousand total twenty-seven thousand five hundred STOP Allowance to receivers California ten thousand divided seventy-five and twenty-five per cent Spokane five thousand division to be made at final hearing, Seattle thirteen thousand divided twelve and one, Portland fourteen thousand five hundred divided thirteen, five and one total forty-two thousand five hundred STOP Phoned above information to Mr. Love this morning STOP Will be home Saturday."

(Transcript of Record, Vol. I, pages 346-347.)

As soon as he received the foregoing telegram, and on December 16, 1926, Mr. Moore wrote and mailed the following letter to Mr. Lieurance, to-wit:

"Mr. A. F. Lieurance,
Central National Bank Bldg., Oakland, Calif.
Dear Sir:

I was astounded at the contents of your telegram of even date from Portland concerning allowances to receivers and attorneys in this Pilcher case. I know of nothing that will more clearly express my feelings on this subject than the telegram which I have sent to Mr. Wm. Fraser, Chairman of the Creditors' Committee in New York, of which I am enclosing herewith a copy.

To put it mildly, I am astounded at the action of yourself and Mr. Eliassen in proceeding with your applications in this matter without any agreement with creditors and without creditors being heard by the Court.

Yours truly,
WNM/WH Walton N. Moore."

(Transcript of Record, Vol. II, page 475.)

On the same day and immediately thereafter Mr. Moore sent a telegram to William Fraser at New York which reads as follows:

"Telegram received STOP To my utter astonishment I received following telegram today from receiver Lieurance at Portland quote work completed here this morning STOP Orders obtained all jurisdictions pay forty percent dividends STOP Allowance to attorney California ten thousand Spokane twenty-five hundred Seattle five thousand Portland ten thousand total twenty seven thousand five hundred STOP Allowance to receivers California ten thousand divided seventy-five and twenty-five percent Spokane five thousand division to be made at final hearing Seattle thirteen thousand divided twelve and one Portland fourteen thousand five hundred divided thirteen five and one total forty-two thousand five hundred STOP Phoned above information to Mr. Love this morning STOP Will be

home Saturday end quote receiver Lieurance and his attorney were present when telegram of December ninth to you was prepared and consented thereto STOP In view of this fact we consider applications for allowances in western jurisdiction which were made without any notice to creditors committee here as being unwarranted and in violation of understanding stated in telegram of December ninth STOP We contemplate making immediate application to western courts to set aside the allowances as excessive and exorbitant and to give creditors full opportunity of being heard with respect to the allowances STOP Will your committee join in making this application or request to western courts and bear their share of expenses and fees incident thereto.

Walton N. Moore."

(Transcript of Record, Vol. II, pages 475-476.)

After sending this telegram, Mr. Moore wrote a letter to Mr. Fraser confirming the same which reads as follows:

"Dear Sir:

I am enclosing herewith copy of a night-letter just sent you. It is so complete in itself that it leaves but little to be said here.

The action of Lieurance and his attorney Eliassen in appearing in these various courts without any agreement with the creditors is astounding to me and I did not know of it until I received Lieurance's telegram today which is quoted in mine to you.

The only thing omitted in the telegram which has already been sent is an explanation to you of the division of receivers' allowance referred to in Lieurance's telegram. In our recent conference he contended that he was entitled to more compensation than Gotthold and he has secured an order from the Court dividing the receiver's fee between himself and Gotthold as indicated by his telegram. I am sending you an additional

telegram in explanation of this, of which a copy is also enclosed.

You will note that the total of the allowances made is $70,000, which is not final and this will be in addition to whatever allowances are made in the New York courts. I hope you and the Committee will agree with me that this action should be contested."

(Transcript of Record, Vol. II, pages 477-478.)

(The foregoing is the telegram which was referred to in the aforesaid letter as an enclosure.)

On the same day, to-wit, December 16, 1926, Mr. Moore exhibited to Mr. Kirk the aforesaid telegram of Mr. Lieurance to himself, and thereupon and on the same day Mr. Kirk wrote and mailed the following letter to Mr. Eliassen, to wit:

"Dear Sir:

In this matter, the enclosed copies of telegrams exchanged between Mr. Moore and Mr. Fraser explain themselves.

I am absolutely astounded, in view of the contents of the telegram of December 9th that you and Receiver Lieurance should have gone to the different Courts in the absence of any representative of creditors and secured enormous allowances and fees to him and to you.

The telegram contained unmistakable language to the effect that the question of allowances should be deferred until the Receivers and Attorneys and Committees could exchange views and come to some agreement concerning the gross amounts to be asked for."

(Transcript of Record, Vol. II, pages 492-493.)

The telegram from Mr. Moore to Mr. Fraser which is referred to in the opening paragraph of this letter is the one of December 16, 1926, which is just here-

inbefore quoted. The telegram from Mr. Fraser to Mr. Moore which is referred to in the same opening paragraph was in reply to the aforesaid telegram to Mr. Moore and reads as follows, to wit:

> "Hearing Friday before judge on allowances. Unless hear from you by wire will assume no change in previous stand."
>
> (Transcript of Record, Vol. I, page 348.)

No reply to Mr. Kirk's letter was made by Mr. Eliassen.

On December 18, 1926, Receiver Gotthold wrote and mailed the following letter to Mr. Lieurance, to-wit:

> "Dear Mr. Lieurance:
>
> Mr. Irving Ernst and I appeared before Judge Hand late yesterday afternoon. Members of the Creditors' Committee and representatives of large creditors were also present.
>
> Mr. Fraser read a telegram from Mr. Moore quoting your telegram to him. This was the first knowledge I had that orders for distribution and for allowances had been made in the four Western jurisdictions. The result of making separate applications is just what I feared, namely excessive allowances.
>
> In view of the telegrams passing between us I am somewhat puzzled as to why you included me in your applications. As I agreed to apply only in New York the amounts awarded me in California, Oregon, and Washington can, of course, be eliminated.
>
> It is particularly unfortunate that so much of the assets should be spent for the cost of administration in view of the notice of the results of sales sent to creditors and signed with both our names. I saw a copy of this yesterday for the first time. I am afraid that creditors would

gather from it the impression that they would receive much larger dividends than can be paid.

The result of the hearing was that *ad interim* allowances, of $7,500. to Messrs. McManus, Ernst & Ernst and of $5,000. to me, were made and the creditors here decided to cooperate with the Western creditors in an effort to have the allowances in the Western jurisdiction reconsidered and materially reduced. On the information available here, we all thought these allowances very high.

In view of the splendid work you have done in disposing of the stores it would be too bad to have a controversy over a matter of this kind. I hope that when you have fully considered the matter you will feel like consulting with the Creditors' representatives and voluntarily agreeing to a reduction to more reasonable figures. My compensation, as I have said, is out.

Please let me hear from you about this as soon as you can and also about your plans for the payment of the dividend. How are you coming along with the landlords and the adjustments with the purchasers?"

(Transcript of Record, Vol. I, pages 348-350.)

On the same date, to wit, December 18, 1926, Messrs. McManus, Ernst & Ernst sent a telegram to Mr. Lieurance reading as follows:

"Judge Hand awarded following allowances today, on account to us seventy-five hundred, to Mr. Gotthold five thousand. Mr. Hershey promised to send on money equal to one-half of these allowances. Will you please transfer the necessary funds."

(Transcript of Record, Vol. I, page 350.)

On December 20, 1926, Receiver Lieurance sent a telegram to his co-Receiver Gotthold, which reads as follows:

> "I acknowledge receipt of your telegram of December sixteenth, stating that suggestion contained in my telegram to you of December fifteenth, that you take all receivers compensation allowed in New York, and I take all allowances made to receivers in ancillary jurisdictions, is acceptable to you. I hereby agree to this arrangement. Pursuant to this agreement between ourselves, I am sending you air mail today assignment of any fees to which I am entitled in the New York jurisdiction, and would suggest you mail me an assignment of your interest in any allowances made to receivers in Western jurisdictions. Payment of forty per cent dividend to creditors starting today."
>
> (Transcript of Record, Vol. I, page 351.)

At the time Mr. Lieurance sent this telegram he had already received the telegram of McManus, Ernst & Ernst dated December 18, informing him that the total amount which had been allowed by Judge Hand was $5000.00 to Receiver Gotthold personally, and $7500.00 to McManus, Ernst & Ernst as attorneys' fees. In other words, Mr. Lieurance knew that no allowance had been made to him in the New York jurisdiction, whereas an aggregate of $4500.00 had been allowed to Receiver Gotthold in the Western jurisdictions and, in addition thereto, an allowance of $5000.00 had been made to both Receivers jointly in the Eastern District of the State of Washington, and the division thereof between them was to be fixed by the court at the hearing of their final account. Moreover, he knew that the total aggregate amount which had been allowed to both Receivers in all the Western jurisdictions was the sum of $42,500.00, and that this was substantially more than five per cent.

of the gross amount of sales (including the bulk sale of the stores); and he also knew that as a matter of fact it was nearly nine per cent. of the net amount of funds secured by the Receivers from the sales of the entire property of the estate and which was available for the payment of creditors, Receivers' fees and attorneys' fees.

On December 21, 1926, Receiver Gotthold sent to Receiver Lieurance the following reply to his aforesaid telegram, to-wit:

> "Your telegram December twentieth received. Your telegram December tenth suggested I receive compensation here and you in West. I accepted this arrangement and therefore did not apply for allowance for you here, and am surprised you applied for allowances for me. I consider assignment of allowances improper. Wrote you December eighteenth air mail that I consider Western allowances too high and that those made me should be eliminated. If paid they will be immediately deposited in receivership account here. Are you paying dividend to all creditors or remitting funds here for payment to Eastern creditors?"
>
> (Transcript of Record, Vol. I, pages 351-352.)

Between December 20th and December 29th, 1926, Mr. Lieurance received letters from creditors informing him that the Creditors Committee and Receiver Gotthold and the New York attorneys for the Receivers and, likewise, Judge Hand considered the *ad interim* allowances which had been made to the Receivers and Mr. Eliassen, aggregating $42,500.00 to the Receivers and $27,500.00 to Mr. Eliassen, personally, were grossly excessive.

On December 29, 1926, Mr. Moore, after having been authorized by the General Creditors Committee so to do and after having employed Francis J. Heney on behalf of the General Creditors Committee to act as attorney in the matter, presented a petition to Judge St. Sure for an order requiring Receiver Lieurance and his attorney Mr. Eliassen to show cause why the order for *ad interim* allowances to them respectively, which had been made by Judge St. Sure on December 10th, should not be reduced.

When Mr. Heney presented this petition to Judge St. Sure, the latter after being informed of the nature of the proceeding and after having read the petition asked Mr. Heney if he personally had talked with Mr. Eliassen on the subject and, upon receiving a negative reply, suggested that such a conference might avoid litigation. The suggestion was immediately adopted by Mr. Heney and the petition was left with Judge St. Sure with the understanding that it would not be filed unless negotiations for an amicable settlement failed.

On that same day, or the next day, Mr. Eliassen and Mr. Heney had a conference at the latter's office in which Mr. Eliassen promptly stated that he was willing to consent to a reduction of the amounts allowed to him but that the aggregate of the allowances to him should not be less than $15,000.00. Mr. Heney immediately consented thereto. Then Mr. Eliassen agreed to take the matter up with Mr. Lieurance and endeavored to have him consent to the reduction of his allowances to the same aggregate amount of $15,-

000.00. Shortly afterwards, Mr. Eliassen and Mr. Lieurance together, had a conference with Mr. Heney, at which this reduction also was agreed upon among them.

Unfortunately, however, a disagreement arose between the respective parties over the recitals and whereas which constituted the introductory part of the proposed written agreement which was prepared by Mr. Eliassen. These differences were not finally settled until about the middle or the latter part of May, 1927.

This written agreement as executed contains stipulations to the effect that Receiver Lieurance and his attorney, Mr. Eliassen, should give reasonable notice to the Creditors Committee if and when an application was made for additional fees to Receiver Lieurance and/or additional fees to Attorney Eliassen at the time of the presentation of the receiver's final account, or at any time prior thereto; and that the creditors reserved the right to object to any and all such additional Receivers' fees and/or attorneys' fees.

Pursuant thereto and when the final account of the Receivers was filed by Mr. Lieurance in the several Western jurisdictions, including applications for additional fees to him as Receiver and to Mr. Eliassen as his attorney, the Creditors Committee was given such reasonable notice, and did file the objections thereto in the several jurisdictions; and thereupon a stipulation was entered into between the parties in interest under and by which all these matters were

to be heard by the United States District Court for the Northern District of California.

Pursuant to this stipulation, the matters were all heard by that court upon the report of the Master which had been appointed by it to take testimony and make a report upon the same.

Thereupon the United States District Court for the Northern District of California, after a hearing upon objections and exceptions to the Master's report, rendered its judgment and decree awarding $20,000.00 additional fees to Receiver Lieurance, and $15,000.00 additional fees to Attorney Eliassen.

These additional allowances of fees to Receiver Lieurance and his attorney, Mr. Eliassen, by Judge St. Sure, were assigned as error upon this appeal by the objecting creditors.

The final account of Receiver Lieurance showed, among other things, the following items, to wit:

"Cash transferred to Receiver Gotthold at New York,	$25,000.00
Ad Interim payment of attorneys fees to Edward R. Eliassen,	15,000.00
Ad Interim payment of receivers fees to A. F. Lieurance,	15,000.00
Fees of Special Master,	250.00
Administration expenses,	4,104.22
Balance on hand at time of filing of said final account,	41,975.28"

If the aggregate amount of $35,000.00 which was allowed by Judge St. Sure to Receiver Lieurance and his attorney, Eliassen, is deducted from the aforesaid balance of $41,975.28, it leaves a net balance of only $6975.28.

The judgment and decree of the District Court for the Northern District of California also allows, however, an additional amount of $769.71 to Philip A. Hershey as expert accountant; and deducting that amount from the aforesaid net balance leaves only $6225.28. From this must be deducted the $1500.00 fee to the Master and other administration expenses; so that the true balance is substantially less than $5000.00.

The affidavit of Grant H. Wren, who appeared as one of the attorneys for the objecting creditors, was admitted in evidence before the trial court and contains the following statements, to-wit:

> "On or about the 27th day of January, 1928, affiant received from McManus Ernst & Ernst, attorneys for Receiver Gotthold, a telegram, a portion of which reads as follows:
>
> 'Three claims aggregating ten thousand dollars now pending here before District Court and dividends therefor must be set aside. Has Lieurance done so stop Expenses have been incurred here for Master hearing disputed claims and premiums bonds of both receivers stop'
>
> "That on or about the 8th day of February, 1928, affiant received, through the United States Mail from said McManus Ernst & Ernst, attorneys for said receiver, a letter enclosing copy of communication written by said McManus Ernst & Ernst to Mr. William Fraser, chairman of the eastern creditors committee, a portion of which letter reads as follows:
>
> 'Another very vital question arises and that is this: there are still approximately $10,000.00 of claims in litigation for which dividends must be reserved in the event that the court directs that the claims be good; there are the fees of Mr. Cardoso as master, and there is a substantial

balance due to Mr. Gotthold for moneys which he has personally expended and which I understand to be approximately $1250.00.

'I do not wish to undertake to fix the fees of Mr. Cardoso as special master, but I know that he has done a considerable amount of work, has decided approximately twenty-five claims, and I think the court should allow him in the neighborhood of $2500.00.' "

(Transcript of Record, Vol. I, pages 225-227.)

In its order confirming the Special Master's report, the District Court for the Northern District of California inserted the following words, to-wit:

"With the understanding that Receiver Lieurance and his attorney, Edward R. Eliassen, undertake to pay an apparent deficit for expenses of administration incurred at New York and estimated at $1700.00, the exceptions to the report of the Special Master are over-ruled and the report is confirmed."

(Transcript of Record, Vol. I, page 227.)

This order was made on March 26, 1928.

The final account of Receiver Lieurance shows that on December 18, 1926, an *ad interim* allowance to Receiver Gotthold of $5000.00 was paid by the New York Receiver, and also of $7500.00 attorneys' fees to McManus, Ernst & Ernst. The same account shows that there was cash on hand with the New York Receiver of approximately $20,350.00. It further appears from Receiver's Exhibit 1 that on either May 4 or May 10, 1927 (the documents comprising the exhibit being contradictory as to the date), Judge Hand directed payment of a second dividend of ten per cent. to creditors, and fees as follows:

"To Arthur F. Gotthold, second interim allowance on account of his fees as receiver, of $2500.00; a second interim allowance of $7500.00 together with certain disbursements to McManus, Ernst & Ernst on account of services rendered as attorneys for the complainants and receivers; a sum of $1250.00 to certain attorneys for the defendant; a sum of $5000.00 to S. D. Leidesdorf & Co. for services rendered to the receiver as accountants, and to Mr. Fraser, chairman of the creditors committee for payment to Francis J. Heney for services rendered, $1500.00."

(Transcript of Record, Vol. II, pages 547-548.)

Subsequently, as appears from the exhibits, after a rehearing, Judge Hand allowed the accountants an additional sum of $2700.00, making $7700.00 in all. The allowances thus made totaling $20,745.25, are slightly in excess of the balance which Receiver Gotthold had on hand. It thus appears that the total aggregate allowance of Receivers' fees which have been allowed and paid, or ordered paid, in both jurisdictions, is as follows:

To A. F. Lieurance,		$35,000.00
To Arthur F. Gotthold,		7,500.00
To Edward R. Eliassen,		30,000.00
To McManus Ernst & Ernst,		15,000.00
Total receivers' fees,	$50,000.00	
Total attorneys' fees,	45,000.00	
Grand Total,	$95,000.00	

This was one-fifth of the total net amount obtained by the Receivers from the sale of assets which were thus made available for payment of dividends to creditors, Receivers' and attorneys' fees, and expenses of administration.

The preferred claims, amounting to only $5816.34, were paid in full, and fifty per cent. was paid upon general claims which had been allowed.

No provision has been made for the payment of the additional $10,000.00 of creditors' claims which are in litigation.

The amounts paid to Mr. Hershey, the expert accountant who was employed by Receiver Lieurance, are as follows:

Monthly advances	$ 2,100.00
In December, 1926,	5,900.00
May, 1927,	2,000.00
Additional amount allowed by order of District Court for Northern District of California,	750.00
Total,	$10,750.00

The total amount allowed by Judge Hand to the New York expert accountants, S. D. Leidesdorf & Co. was $7700.00.

In addition to these sums, Receiver Lieurance paid $27.50 per week to a competent bookkeeper during the entire period of the Receivers' administration.

ARGUMENT.

The issues upon this appeal are:

First. Is the additional sum of $20,000.00 to A. F. Lieurance, as Receiver, excessive?

Second. Is the additional sum of $15,000.00 to Edward R. Eliassen as attorney for Receiver Lieurance excessive?

THIRD. Was it error on the part of the trial court to approve the payments to the special accountant, Philip A. Hershey, amounting in the aggregate to $10,750.00?

By his conduct in refusing to inform his co-Receiver Gotthold or any of the other interested parties in New York, for the benefit of Judge Hand, as to the aggregate amount which he and his attorney desired and hoped to obtain as and for their respective fees in the Western jurisdictions, Receiver A. F. Lieurance willfully and deliberately brought about a situation which certainly made excessive the total aggregate of fees for receivers and attorneys, respectively, allowed in both the Western and Eastern jurisdictions. That Receiver Lieurance and his attorney Eliassen are responsible for this result is clearly shown by the telegrams and letters which appear herein under the heading *"Compensation of Receivers and Their Attorneys"* in the *"Statement of the Case."*

The creditors of Pilcher & Co., Inc., were the equitable owners of the entire receivership fund—subject only to the proper and reasonable expense of the receivership administration.

The action of Receiver Lieurance and his attorney Eliassen in the matter of the original *ad interim* allowances of fees for them in the Western jurisdictions fully justified the creditors committee in opposing their respective applications for additional allowances at the hearing of the final account prepared by Receiver Lieurance and filed in the several Western

jurisdictions. This opposition by the creditors committee made it necessary to take the depositions of Walter Ernst and Arthur F. Gotthold in New York City. Receiver Lieurance unhesitatingly incurred the expense of sending his attorney, Edward R. Eliassen, to New York City to attend the taking of these depositions. If Receiver Lieurance and his attorney Eliassen, or either of them, had gone to New York to testify before Judge Hand when the application was pending before him, to make the first *interim* allowance of fees for the Receivers and attorneys, respectively, it would have been much more to the purpose and in line with the duty of the Receivers to aid the courts to properly conserve the receivership fund for the benefit of the creditors, its equitable owners.

If the allowances which were made by Judge Hand to Receiver Gotthold and attorneys McManus, Ernst & Ernst, and the expert accountants Leidesdorf & Co., respectively, are or either of them is too large, the loss thereby caused to the creditors ought to fall upon the party or parties responsible for the same, and therefore such excess amount ought to be deducted from the fees to be allowed to Receiver Lieurance and attorney Eliassen.

In other words, under the circumstances, it would be equitable for this court to determine the amount which would be fair and reasonable to be allowed to both the Receivers, and then to deduct therefrom the amount which had been allowed by Judge Hand to Receiver Gotthold and permit Receiver Lieurance to have the balance thereof only. The same method

would be equitable in fixing attorneys' fees. If any other method than this one is adopted, the creditors will be compelled to bear the burden and such a result does not seem to be just or equitable.

It has been and doubtless will be contended herein that Mr. Lieurance possessed extraordinary expert ability in the conduct of chain stores and that this character and high degree of ability was essential to the successful conduct of this chain of only sixteen small-sized stores, and in effect that Mr. Lieurance ought to be paid on the basis of the value of the services of such an exceptional expert.

As such exceptional expert, however, when he was conducting a chain of 497 stores for the Penney Company (in sixteen only of which stores he was a stockholder) his salary was only $10,000.00 per year, or $833.33 per month. This would make a total sum of $4166.66 as a proper salary for that character of expert for the period of five months from June 3, 1926, to November 3, 1926, which is the entire period that the stores were operated.

Moreover, Mr. Lieurance testified that he was required to or did leave two-thirds of his salary in the business, when working for the Penney Company and that he received shares of stock for the same. Of course he earned a profit upon these shares of stock and his testimony is to the effect that this profit amounted to an average of approximately $30,000.00 per year, in addition to his salary. Of course his shares of stock would have earned that same amount of profit, presumably, if some other equally competent

person had been employed by the Penney Company to perform the service then being performed by Mr. Lieurance. Hence, we ought not to take into consideration in this matter anything except his actual salary of $10,000.00 per year.

That it required the same high degree of ability to conduct a chain of sixteen small stores as was required in the conduct of the business of Penney & Company with approximately 500 stores and later 600 stores is pure nonsense. As a matter of fact the paramount advantage in doing business of chain stores is that of being able to *purchase* various kinds of merchandise in *very large quantities,* and thus to secure a cheap price and also full carload freight rates for its transportation. By reason thereof the chain stores are rapidly *eliminating wholesale dealers and jobbers* in their various lines of business. By way of illustration, the Penney Company have been selling large amounts of merchandise to A. V. Love & Company at Seattle, Washington (one of the largest creditors of Pilcher & Co., Inc.) Mr. Lieurance so testified.

Did the receivership for Pilcher & Co., Inc., as conducted by Mr. Lieurance, do likewise and make *large sales* of goods at a profit to A. V. Love & Company? No, *on the contrary,* the receivership purchased substantially large quantities of goods from Love & Company and it is fair to infer that Love & Company made a reasonable profit upon the thing. Moreover, Mr. Lieurance testified that he purchased most of the goods for the receivership from local wholesalers nearest to his points of consumption or, in other

words, to his respective stores in which the goods were needed.

Hence, it appears from the testimony of Mr. Lieurance himself that the *main purpose* for which his expert knowledge *might* have been used for the successful conduct of a large chain of stores, was *not* one of the elements of success in his conduct of this receivership. In other words, the receivership of Pilcher & Co., Inc., required the services of a person of *only ordinary* ability and competent for such duties and service, and the amount of compensation which should be allowed to Mr. Lieurance is such only as would be reasonable for *that* kind of service, and it should be only their fair value when measured by the *"common business standards."* As said by the Supreme Court of Montana, in the case of *Hickey v. Parrott Silver & Copper Co.,* 79 Pac. 698:

> "Law does not compel one to accept from the court employment as a receiver, any more than it compels him to accept employment from the owner as a superintendent. If he jeopardizes other interests by accepting the receivership, he does it voluntarily, and is not entitled to be recompensed therefor."

and

> "It is well established that the compensation allowed a receiver must be reasonable, but WHY compensation must be GREATER, in order to be reasonable, for doing certain work, when the hiring is done by the court, than it would be for the same duties *if the hiring were done by an individual, is not apparent.* * * * And these remarks apply *equally* to allowances for *counsel* fees."

* * * * * * *

"The consideration that should be controlling with the court in fixing compensation are the value of the property in controversy; the practical benefits derived from the receiver's efforts and attention; time, labor, and skill needed or expended in the proper performance of the duties imposed, and their fair value, measured by the common business standards; and the degree of activity, integrity, and dispatch with which the work of the receivership is conducted. The percentage basis is not always the equitable method. As was said in Grant v. Bryant, 101 Mass. 570, 'The Court does not regulate the compensation of its officers upon the basis of a fixed commission upon the amount of money passing through their hands, but allows them such an amount as would be reasonable for the services required of and rendered by a person of *ordinary* ability and competent for such duties and services.' See also, the following cases: Schwartz v. Keystone Oil Co., 153 Pa. 282, 25 Atl. 1018; Boston Safe Deposit & T. Co. v. Chamberlain, 66 Fed. 843, 14 C. C. A. 363; French v. Gifford, 31 Iowa 428; Jones v. Keen, 115 Mass. 170; Martin v. Martin, 14 Or. 165, 12 Pac. 234; U. S. v. Church etc. (Utah) 21 Pac. 516; Sherley v. Mattingly (Ky.), 51 S. W. 189; Union National Bank v. Badger, 103 Wis. 39, 79 N. W. 20."

In the case of *Trustees v. Greenough,* 105 U. S. 536, the Supreme Court of the United States in referring to fees allowed to receivers for railroads and their counsel said:

"Sometimes, no doubt, these allowances have been excessive, and perhaps illegal; and we would be very far from expressing our approval of such large allowances to trustees, receivers, and counsel as have sometimes been made, and which have justly excited severe criticism.

Still, a just respect for the eminent judges under whose direction many of these cases have

> been administered would lead to the conclusion that allowances of this kind, if made with moderation and a jealous regard to the rights of those who are interested in the fund, are not only admissible, but agreeable to the principles of equity and justice."

In view of the foregoing principles, the sum of $5,000.00 would be reasonable and ample compensation for the services of Mr. Lieurance as receiver during the five months that the stores were operated. Moreover, $2,500.00 additional would be *more than liberal* compensation for the services which were necessarily performed by him in this receivership matter thereafter. But he has already been paid *exactly twice the aggregate of these amounts.* In other words, he has already been paid the sum of $15,000.00 for his services as Receiver, and that amount is very much more than they were reasonably worth, "measured by the common business standards."

It must be kept in mind that, as shown by his own testimony, Receiver Lieurance in the performance of his services provided himself with more than ample assistance and facilities regardless of expense, which minimized the amount of his personal labors, and the expense of which, as in the cases of Mr. Hershey and Mr. Eliassen, is charged against the receivership.

An illustration of the extravagant methods by which Mr. Lieurance made the work easy for himself regardless of expense to the receivership estate is his employment of Mr. Philip A. Hershey as an expert accountant, and particularly by his retention of him in that capacity from the time of the inception of

the receivership down to the last day of the hearing before the Master.

We know that Mr. Hershey would not have been guilty of such extravagance in the conduct of his own business because he testified as follows:

> "I gave attention to other work in my office during that period. * * * I have quite a number of clients I will say that, but their affairs were attended to. * * * But as to just how much in percentage this work was in comparison with other work I could not say."
>
> (Transcript of Record, Vol. I, page 286.)

and again,

> "Q. Have you regularly employed in your office any other accountants?
>
> A. *Only from time to time as the occasion arises,* accountants are *high priced men to employ and we do not care to have them around* when they are not working."
>
> (Transcript of Record, Vol. I, page 287.)

It was different with Mr. Lieurance when acting as Receiver. He liked to have one at his elbow all the time so as to save him from the annoyance of doing personally any detail work. Like many men of high executive ability, he evidently disliked and despised detail work and believed that the way to get things done was to hire other persons to do such work for you and thus enable you to utilize all of your time in thinking out the *big problems* of your business affairs.

But there were no "big problems" of business affairs in this receivership which required constant and deep thinking.

Of course, Mr. Hershey was more than willing to give his valuable time to such *very petty detail* work as that of figuring out forty per cent. dividends upon approximately 650 claims; and checking the *daily cash and petty expense reports* from the sixteen stores. He admits, however, that the Receiver had under employment a woman bookkeeper and that she was competent and that it took him, Mr. Hershey, only from five to ten days to formulate the set of books for the receivership. His testimony that some of the bookkeeping was complicated and difficult, because transfers of goods were made from one store to another and that these transfers were made on credit and not for cash and that a separate account thereof had to be kept, is amusing, notwithstanding the serious demeanor of Mr. Hershey at the time he was testifying.

As hereinbefore stated, the system of bookkeeping which he formulated consisted of a journal and ledger for each of the sixteen stores and then a composite journal and ledger for the receivership and in which the results of the other sixteen journals and ledgers were compiled. Keeping separate books for each store simplified the entire matter and made it easy for the Receiver subsequently to make a separate account for each of the four western jurisdictions if it became necessary so to do.

All the transactions in all the different stores were on a cash basis with the single exception of a comparatively few transfers of goods from one store to another. The system was very simple and the bookkeeping was far from being complicated or dif-

ficult. Any competent bookkeeper such as could have been employed for a salary of $250.00 to $300.00 per month could have kept the books and could have done all the work that was done by Mr. Hershey after the first ten days of his services.

We are frank to say that in our opinion, based upon our personal experiences as attorneys, the sum of $30,000.00 as a total fee for all of the attorneys would not be excessive or unreasonable under all the circumstances of this case; but we do not feel at liberty to express our personal opinion as to what would be a reasonable amount to allow to Mr. Eliassen for his services in the matter, while keeping in mind the rights of the creditors to the fund and the fact that Judge Hand has already allowed the sum of $15,000.00 *ad interim,* to Messrs. McManus, Ernst & Ernst for their services in the matter.

It is already in evidence by the testimony of Mr. Eliassen himself, that when he suggested the reduction of the *ad interim* allowances to himself from the aggregate amount of $27,500.00 to $15,000.00, Mr. Heney promptly agreed that this was a reasonable amount to be allowed to him at that time, in view of the fact, as Mr. Heney then understood it, that the receivership administration had been practically completed.

ATTORNEYS' FEES.

In the case at bar there was no important litigation. The total amount of creditors' claims, including both general and preferred, aggregated $751,-

860.09. Of these the total amount claimed as general was $746,043.75 and the total amount allowed as general was $718,794.12.

The difference in the amount claimed and the amount allowed was only $27,249.63, and of this amount $16,382.10 was deducted from the claim of Weber Show Case & Fixture Co. The evidence of Mr. Lieurance shows that this creditor had sold fixtures to Pilcher & Co., Inc., on the installment plan and that the total amount of the contract was $32,-764.21 and he had filed a claim for the entire amount notwithstanding the fact that it had already been paid one-half thereof on the installment plan. Obviously, it was not a difficult matter to induce the Master who heard the contest to reduce this claim by just one-half and he did so. The items of reduction on the other claims are set forth on pages 8 and 9 of the Receiver's report and it appears therefrom that only six claims were contested (including that of Weber Showcase & Fixture Co.). (Transcript of Record, Vol. I, page 63.)

Hence, it appears from the reports and the undisputed evidence that the attorney for the Receiver in the Western jurisdictions was not called upon to perform any kind of extraordinary service and that practically all of his services consisted of the usual routine legal advice for which the Receiver asked from time to time in such matters.

It is undoubtedly true that Mr. Eliassen devoted a very substantial amount of his time to these receivership matters during the first two months of his

employment but, notwithstanding that fact, it is admitted by him that he continued to conduct his general practice during that period. Moreover, he testified that this was his first experience as the attorney for a Receiver and hence it is fair to assume (notwithstanding his undoubted ability as a lawyer) that his inexperience in such matters made it necessary for him to give much more time to the solution of the Receiver's legal problems than would have been necessary for one who was experienced in such matters. If Receiver Lieurance saw fit to refuse the assistance of the experienced attorneys for the Board of Trade, who are experts in such matters, and to employ his personal attorney who had no such experience it would not be fair to require the creditors of Pilcher Co., Inc., to pay for his education therein.

If the services which were performed by Mr. Eliassen as attorney for the Receiver could have been performed in one-fourth or one-half of the time which Mr. Eliassen devoted to them it would not be fair to estimate his compensation on the basis of time expended.

As was said by the Circuit Court of Appeals in the case of *Boston Safe Deposit & Trust Co. v. Chamberlain,* 66 Fed. 847:

> "An examination of the items of services shows that they were not for matters of large importance affecting the receiver or the property, but were in great part advice and consultation with reference to the usual questions arising in connection with a railroad receivership. * * * The allowance of $4,000 for counsel fees during the first eight months of the receivership is not now

> questioned, and it may be presumed that during this period, at the commencement of his duties, the receiver had new questions and difficulties which require more constantly the advice and services of counsel; but for the subsequent two years the items of service, although constant and frequent discloses no such demand upon the time of counsel as would prevent his attending to the usual claims of a general practice. All of the parties to the case were represented by counsel and the duties of the receiver's counsel had reference solely to the receivership. For such services to a receiver, a fair and just method to compensate counsel is by an annual allowance rather than to value each item of service. We have been unable to escape the conclusion that, valued as such services usually are under similar circumstances in connection with a railroad of minor importance, operated as part of a system, and not earning its running expenses, more than $3,000 a year for the receiver's counsel is unreasonable."

Much of the work that was done by Mr. Eliassen, like much of the work that was done by Mr. Hershey, was work which ought to have been done by the receiver himself and the creditors should not be called upon to pay twice for the same service by allowing full compensation to each and both of them.

In *Wilkinson v. Washington Trust Co.,* 102 Fed. 28, the Circuit Court of Appeals held that:

> "A receiver is not entitled to an allowance for disbursements to attorneys for making reports to the court involving nothing more than a simple narrative of his acts, and an account of his receipts and disbursements."

In its opinion the court on this subject said:

> "There was no error in the order of the court striking out the $750 paid by the appellant for

the services of attorneys in preparing and presenting his reports as receiver and master. It is one of the indispensable personal duties of a receiver and of a master to make a report of his acts, and of his receipts and disbursements, to the court which appoints him. If he is incapable of keeping accounts and of reporting his receipts and disbursements, he cannot be permitted to receive compensation for the discharge of these, his personal duties as receiver, and to charge the trust with moneys expended by him to hire others to discharge them for him. Such allowances would pay twice for the same services. In ordinary cases the making and presentation to the court of reports of the acts, receipts, and disbursements of receivers and masters is one of their indispensable duties. The compensation allowed them as receivers or masters pays them for this service, and they cannot be allowed disbursements which they may have made to hire attorneys or others to discharge these duties for them, because such allowances would effect two payments for the same service, and because cestuis que trustent are always entitled to a report of the doings of their trustee, without expense or charge to them."

Much reliance is placed by attorney Edward R. Eliassen upon the testimony of attorney experts as to the reasonable value of services which were performed by him in this matter.

Of course, Your Honors may study and give some consideration to the testimony of those experts upon that subject. The respective opinions of these experts, however, were based upon the typewritten statements of Mr. Lieurance and Mr. Eliassen regarding their services. These experts did not have the advantage of hearing the testimony of either Mr. Lieur-

ance or Mr. Eliassen upon cross-examination. Hence they were not in as good position as this court will be to pass an opinion upon the reasonable value of the aforesaid services. Moreover, they did not read the depositions of Mr. Ernst and Mr. Gotthold, and did not know anything whatever about the amount or character of work which was done by Receiver Gotthold or by Messrs. McManus, Ernst & Ernst, respectively.

In any event, however, it is not the opinion of such experts which must prevail. On the contrary, the trial court in the first instance, and this court in the second instance, has the right and the duty to determine the question of the reasonable value of the services performed by the attorney for the Receiver from all the facts and circumstances in the case, including the fact that one of the Receivers was located in New York City and the other on the Pacific Coast, and that both of them were receiving advice from Messrs. McManus, Ernst & Ernst, who were first employed in the case as attorneys for the Receiver. And again it must be kept in mind that the creditors who are entitled to the fund ought not to be called upon to pay double for such services and particularly so if additional work was caused by differences of opinion between the respective attorneys for the Receivers.

The members of this Honorable Court doubtless know from experience how difficult it is to get an experienced attorney to testify that the reasonable value of services performed by a fellow attorney is less

than the amount claimed or asked for by him; whereas it is a comparatively easy matter to get attorneys of prominence in the profession to testify favorably on behalf of the attorney claimant. This is an additional reason why the expert opinion of attorneys in such matters should not be taken too seriously or be given too much weight.

Furthermore, Mr. A. B. Kreft, Referee in Bankruptcy at San Francisco for approximately twenty years, after reading the statement of Mr. Eliassen, testified that

> "In my opinion from twenty to twenty-five thousand dollars will be a fair and reasonable compensation for services performed by Mr. Eliassen in the matter."
>
> (Transcript of Record, Vol. II, page 458.)

Mr. William J. Hayes, Referee in Bankruptcy at Oakland for more than ten years, testified that after reading the aforesaid statement of Mr. Eliassen he was of the opinion that twenty-five thousand dollars was reasonable. It also appears from Mr. Hayes' testimony that the total ordinary fees which would have been allowed to the trustee in bankruptcy in an estate of $500,000, when computed on percentages, would have been approximately $5000.00, which amount could be doubled in the discretion of the court where special services were required in running the business.

(Transcript of Record, Vol. II, pages 453-455.)

Mr. Milton Newmark, an able Federal practitioner and formerly associated with Mr. Nathan H. Frank

and Walter D. Mansfield, the latter being one of the foremost bankruptcy lawyers on the Coast for many years, testified after carefully studying the record that in his opinion twenty thousand dollars would be reasonable compensation for the Receiver's attorney.

(Transcript of Record, Vol. II, pages 456-457.)

COMPENSATION FOR HERSHEY & CO. AS ACCOUNTANTS.

In its order appointing a Receiver in this matter, the United States District Court for the Northern District of California, said:

> "Four—Ordered, adjudged and decreed that the appointments of Philip A. Hershey & Co. as *accountants,* and Edward R. Eliassen, Esquire, as attorney for the Receivers be and they are hereby confirmed and approved." (Italics ours.)
>
> (Transcript of Record, Vol. I, page 38.)

It will be observed that the court approved the appointment of Hershey & Co.—NOT as bookkeepers—but as "ACCOUNTANTS."

In their testimony, both Mr. Lieurance and Mr. Hershey have insisted that there is a radical distinction between a bookkeeper and an "accountant." It is conceded on behalf of the objecting creditors, that this contention is correct. Consequently, it further appears that the court did *not* authorize the employment of Hershey & Co. as bookkeepers, and therefore any services which were performed by them as bookkeepers were not specifically authorized by the court.

Mr. Hershey testified that he was first employed by Receiver Lieurance on June 3, 1926. On cross-examination, he further testified as follows:

"I should say that I was engaged probably from five to ten days in formulating a set of books to be used by the Receiver at his Oakland office.

Q. Now, after those ten days of work, what work was done by you that a bookkeeper would not do, or would not be able to do, a competent bookkeeper?

A. I could not answer that question, because I don't know what a competent bookkeeper could have done under those circumstances.

Q. You had a competent bookkeeper there, didn't you?

A. I judge that we did.

Q. Couldn't she have made those entries without any assistance from you?

A. That is merely a supposition. I acted under instructions from Mr. Lieurance, the Receiver, and my services were rendered under his instructions.

Q. He did not instruct you as to the manner or method of keeping the accounts, did he?

A. No, he did not.

Q. Nor making the entries?

A. He told me what results he wanted from these books."

(Transcript of Record, Vol. I, pages 289-290.)

The only other strictly "accountant" work which was done by Mr. Hershey (as shown by his own testimony) was that of examining the books and vouchers of Pilcher & Co. in New York City prior to the 28th day of February, 1926, for the purpose of checking up the correctness and amounts of claims of creditors of Pilcher & Co. who were entitled to participate in the receivership assets. This was done in November and December, 1926, or in other words, after all the stores had been sold. The books had lapsed on the 28th day of February, 1926, or had not been kept up

subsequent to that date and prior to the Receivership.

Mr. Hershey said:

> "When I went to New York, I received there information from accountants connected with the receivership in New York, concerning these books, up to the date of the receivership in this way: I worked with a firm of accountants in New York, in the checking of the items which had been posted into the accounts, possibly the ledger, from February 28 to June 3, the date of the receivership. So that, while in New York, and in conjunction with the accountants there, I examined the books of the Pilcher Company from February until the inception of the receivership. I transmitted that information into my working papers. I was absent on that trip 38 days; there was traveling time in between; I do not recall just what that traveling time was."
>
> (Transcript of Record, Vol. I, page 272.)

The only New York accountants who appeared to have been employed by the Receivers there are the firm of S. D. Leidesdorf & Co., to whom payments aggregating $7,700.00 were made by Receiver Gotthold and allowed in his account, apparently, by Judge Hand. Hence it appears that practically all of the strictly accountant work (and at any rate, by far the greater part thereof) which was performed by Hershey was participated in by S. D. Leidesdorf & Co. as accountants appointed by Receiver Gotthold. *Non constat* but that evidence was produced before Judge Hand to the effect that S. D. Leidesdorf & Co. did much the greater part of that accountant work. In any event, however, the creditors ought not to be called upon to pay twice for that same work, and if by their

failure to co-operate in determining the amount of compensation to be paid for the same, Receiver Gotthold and Receiver Lieurance have expended more than a proper amount, neither one of them has the right to ask the creditors to stand the loss thereof.

That the greater part of the work which was performed by Mr. Hershey was ordinary bookkeeping, for which the sum of $300.00 a month, which was paid to him by Receiver Lieurance, was big compensation, is evidenced by his own testimony. For instance, he testified under direct examination as follows:

> "In connection with the payment of the first dividend, I performed the following services: I computed the amount of the dividend checks, based upon the claims which were allowed, prepared the checks, and after they were prepared checked the total to see that the total amount of the checks agreed with the 40 per cent of the total amount of the claims filed, and delivered the checks to Mr. Lieurance."
>
> (Transcript of Record, Vol. I, page 279.)

It certainly did not require the services of an accountant worth $10.00 per hour to do this work and particularly the manual labor of filling out the checks which must have consumed the larger part of the time. This is another illustration of the reckless expenditure of funds by Receiver Lieurance to save himself more worry, annoyance and responsibility.

On September 17, 1926, Mr. Hershey went north and visited the stores at Portland, Oregon, and Bremerton, Washington, for the purpose of checking the cash accounts at these stores. He found a shortage of $600.00 at the Portland store and collected it from

the manager. He also discovered that previous to the receivership the same manager had drawn in the neighborhood of $1600.00 and he claimed that the manager had no money with which to pay the same but took his notes for it. He then communicated with Mr. Lieurance who instructed him to discharge the manager, the cashier and the clerk who had been working in conjunction with him.

> "I also suggested the name of the head clerk —each of these stores had not only a manager, but they were fortified to this extent that they had a man who was a head clerk, that is, if the manager was incapable of performing his duties, the head clerk by prearrangement stepped in and ran the store. This man was satisfactory to Mr. Lieurance, I assume, because he instructed me to instruct him in his duties as a store manager, and how to make proper reports. I introduced him at the bank and arranged for his banking facilities, etc. We did not, by the way, replace the two clerks, the cashier and the clerk, that were discharged. We just cut the pay-roll to that extent. I then proceeded to Bremerton, Washington, as fast as I could, because news travels fast in a chain store organization, and I found a situation there which in my opinion called for the discharge of two employees from that store. I immediately communicated with Mr. Lieurance that information, and he instructed me to discharge those employees, and I did, and their places were not filled."
>
> (Transcript of Record, Vol. I, pages 280-281.)

No explanation is made as to why it was not necessary to fill these places and no reason is given why their services were not dispensed with long prior to that time if not necessary to the conduct of the business.

The foregoing work of Hershey was that of an assistant receiver rather than the work of an expert accountant. Anyone could count the cash on hand that morning and demand payment of the shortage and the Oakland books showed the amount of cash that ought to be there.

The second dividend was 10 per cent. and it certainly did not require the services of an expert accountant as distinguished from a good bookkeeper or even a mediocre stenographer to fill out the checks for 10 per cent. of each creditors' claim because anyone can move a decimal point one figure to the left when instructed to do so. Two such persons could verify the figures afterwards, in two hours time at most, by one reading to the other for comparison.

Mr. Hershey testified that he wrote over two hundred letters by actual count. Of course, he means that he dictated them to the stenographer who was in the Receiver's office. This would mean ten letters per day for twenty days. Many busy lawyers knock out that many letters every morning or afternoon as an infinitesimal part of the day's work and practically all large business requires the dictation of many times that number of letters per day the year 'round.

> "A. I can state from the records that there was not a day passed for the first five months of the receivership but what I was in daily contact with Mr. Eliassen and Mr. Lieurance, when they were in Oakland. Of course, I was in communication with Mr. Lieurance when he was out of Oakland, but that was by letter and wire."
>
> (Transcript of Record, Vol. I, pages 282-283.)

Mr. Hershey had his office with Mr. Lieurance and those of Mr. Eliassen were adjoining them on the same floor and it was a perfectly natural thing for Eliassen, Lieurance and Hershey at some time during each day to have a talk together. It would have been strange if they did not do so.

During all this period of five months, however, Mr. Hershey was running his other business as an accountant and Mr. Eliassen was running his other business as an attorney. Of course, each of them probably gave preference to urgent matters of the Pilcher Co. receivership but under the circumstances this did not necessarily reduce the amount of other business conducted by either of them.

Of course, they worked nights occasionally and sometimes Sundays and holidays. What lawyer, expert accountant or business man does not do so?

> "Cross-examination, by Mr. Heney.
>
> In describing this work that I did, when I used the pronoun 'I,' and stated that 'I did this and did that,' I do not mean to be understood as saying that all of this detail work was done by myself, personally; I had assistance.
>
> There was a bookkeeper employed by the Receiver, from the middle of June, I should say, until the end of December. This bookkeeper was a woman, by the name of Harmon, and her salary was $27.50 a week. She performed just the general duty of a bookkeeper and office assistant, under my constant direction. I would class her as a competent bookkeeper."

He further testified that she did not check the reports that were made of cash receipts of sales from each store, to-wit: the daily reports.

A competent bookkeeper, such as he and Mr. Lieurance, both testified she was, could most certainly do all this work.

> "Q. To what extent did she check the reports that were made of cash, receipts from sales of each of these stores?
>
> A. I should not say that she checked these reports; I check the reports myself. These reports came to me to be checked.
>
> Q. Every day? A. Every day.
>
> I do not believe that she assisted in any of this work of computing the amount of percentage on the dividends."
>
> (Transcript of Record, Vol. I, page 284.)

She was certainly competent to do so. Forty per cent. is an easy amount to compute. It is only necessary to move the decimal point one figure to the left in each instance, and then multiply by four.

The Receiver did not employ anyone other than Miss Harmon to assist in the bookkeeping.

> "I speak of, these cross-additions, etc., I had two people working on that at times in addition to myself.
>
> Q. To what extent?
>
> A. I do not quite understand what you mean, to what extent they were employed.
>
> Q. A number of days, or a number of weeks, or a number of months, or how much time?
>
> A. A number of months.
>
> I do not mean that they put in their entire time on it. I had other work in the office on which they were engaged at the same time that they were doing this other work. Occasionally they would do some of the computations.
>
> Q. It might be half an hour's work a day and sometimes an hour?
>
> A. And sometimes a day.
>
> Q. And sometimes a day? A. Yes.

Q. Not very often? A. Sometimes weeks.

Q. Not so that you could give us a statement of how many days they put in?

A. I do not believe that I could do that, no. I had other work in the office. I gave attention to the other work in the office during this period.

Q. How did the total volume of work in your office compare with the work of this particular business?

A. Are you asking me to answer in terms of dollars and cents, or in time of employment?

Q. In labor.

A. Well, I cannot state definitely how many clients I have; I will be very frank with you, I could not tell you off-hand. I have quite a number of clients, I will say that, but their affairs were attended to. A great many of my clients, their affairs had to be postponed until this matter was over; on rendering income tax returns, it was necessary for me to require extensions of time for filing clients' returns; but as to just how much in percentage this work took in comparison with other work, I could not state.

I have other accountants employed in my office, only from time to time, as the occasion arises. Accountants are high-priced men to employ, and we do not care to have them around when they are not working."

(Transcript of Record, Vol. I, pages 285-287.)

Mr. Lieurance evidently did not agree with Hershey because he kept him around during the entire period of the receivership, notwithstanding the fact that an expert accountant's services for a few days once each month would have accomplished all that was necessary.

Mr. Lieurance testified on this same subject in part as follows:

"A. Mr. Heney, it was not exactly a bookkeeper's job. The accounts would have to be

audited, and Mr. Hershey did all of that work and kept the books besides, and did an excellent job, and gave the time that was necessary to keep the books in proper order. So it was not a bookkeeper's job.

Q. A bookkeeper does not have much to do to audit his own books, does he?

A. Anybody can write, but it really takes a pretty good head to tell what to write and where to write, etc.

Q. But any bookkeeper ought to have been able to run these books, shouldn't he?

A. No, I doubt that—I guess a bookkeeper would, yes.

Q. From your experience, what would you say was a fair wage for a good bookkeeper or an accountant to keep these books?

A. Well, there is a difference between bookkeepers and accountants. You can hire bookkeepers for most any price, but I think when you employ accountants that do the bookkeeping and accounting work, too, that is a different situation.

Q. In that particular period up to the time you sold out these stores, what necessity was there for having an accountant, as distinguished from a bookkeeper?

A. The work of chain store accounting is complicated.

Q. If you have your daily reports from your stores, what difference does it make whether it all came out of one store, or came from fourteen different stores?

A. There were four different court jurisdictions, for one thing, and there were sixteen stores, and there was interchange of merchandise, and there was everything to complicate the work."

(Transcript of Record, Vol. I, pages 249-250.)

"Before I paid this amount to Mr. Hershey I took the pains to look into the matter through one of the large accounting firms here.

Q. Which ones did you inquire of?

A. Mr. Lilly, of McLaren, Goode & Co.

Q. Any others?

A. No, just the one at that time.

Q. Can you tell the conversation, the talk that you had with Mr. Hershey at the time this amount of $5,900 additional money was agreed upon?

A. Mr. Hershey felt that he was entitled to payment for his services, and the allowance had been made to the Receivers and the attorneys, and it was quite evident that Mr. Hershey was entitled also to his payment, and he said he was going to present his bill, and it would be $5,900, and I gave it consideration and, in proper time, paid it; I was satisfied in my own mind that it was a reasonable charge, very reasonable for the work done, and I confirmed that by communicating with Mr. Lilly, of McLaren, Goode & Co.

Q. So that you did not have any discussion with him other than what you stated in regard to the $5,900? A. Nothing that I recall.

Q. He did not explain to you how he reached the figure of $5,900?

A. I couldn't state definitely the conversation. There has been some conversation about hours, and the basis of the charge, but I do not recall that sufficiently to give any accurate testimony on it.

Q. Did he fix the compensation by the hour in your talk?

A. No. I do not recall that he did or that he did not. I reckoned this payment largely from this standpoint, Mr. Heney, if we had employed a bookkeeper in each store, we could not have employed anyone that was anywhere near as competent, and if we would multiply that employment by sixteen, the charge of Mr. Hershey would be much less than it could possibly have been the other way.

Q. But a chain of stores would not do that, and they never do that? A. No.

Q. In fact, it is to avoid that that they have chain stores?

A. They have it all in one place, where you can handle them properly.

Q. So that would not be exactly the right way to figure it, would it?

A. No, I don't know that it would be the right way to figure it. However, in this particular instance, it is just one way of looking at it. The property was scattered over the country, and we did not know whether or not we were going to have to account for all of these things in the various jurisdictions, or account for them in one; we did not know anything about it. We had to be pretty careful."

(Transcript of Record, Vol. I, pages 251-252.)

At the hearing before the master, it developed that Receiver Lieurance had subsequently paid Mr. Hershey two thousand ($2,000.00) dollars additional and this fact was unknown to the creditors or their attorneys until it came out at the hearing.

Mr. Lieurance further testified that no stores were operated after about November 3, 1926, and that the last one sold was on that date; and that since that time the bookkeeping related only to the payment of dividends and the auditing of the claims and the auditing of the books of account and the checking up thereof with the claims filed.

(Transcript of Record, Vol. I, pages 255-256.)

It thus appears that a large amount of the so-called "Accountant Services" rendered by Hershey was merely rountine bookkeeping work and that the employment of a high priced accountant to perform such services was wholly unnecessary and an expense to the estate, which it was entirely improper for the Receiver to incur.

CONCLUSION.

Summarizing, appellants respectfully submit that if the total fees allowed to the Trustee and his attorney in a bankruptcy estate of approximately $500,000.00 would have been considerably less than $40,000.00, that there is no reason whatever why the fees should be more than double that amount in this proceeding which is also in equity and under the jurisdiction of the same courts; especially when the estate was not involved, when there was almost no litigation and when the work of the liquidation was practically concluded within less than six months after the commencement of the proceedings.

In fact, the greater part of any services performed since said time has been caused by the acts of the Receiver and his attorney in obtaining excessive and exhorbitant allowances in the manner revealed by the foregoing record and contrary to the understanding had by them with representatives of objecting creditors. Thus it became necessary for the appellants to file objections and spend large sums of money in order to present the facts of this case clearly before the above court.

In conclusion, appellants urge that the fees allowed in this matter are grossly excessive and that the judgment and decree of March 27th, 1928, be modified so that the total fees allowed including the *ad interim* allowances shall be as follows:

Mr. Eliassen—not to exceed $20,000.00 and any excess received be refunded to the estate.

Mr. Lieurance—not to exceed $15,000.00 and any excess received to be refunded to the estate.

Mr. Hershey—not to exceed $5,000.00 and the Receiver's account be surcharged and the Receiver ordered to refund any amount paid in excess thereof.

That the appellants be allowed their costs herein.

And for such other order as may be meet in the premises.

Dated, San Francisco,
October 21, 1929.

Respectfully submitted,

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GRANT H. WREN,
Attorneys for Objecting Creditors.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WALTON N. MOORE DRY GOODS CO. (a corporation), J. H. NEWBAUER & COMPANY (a corporation), G. W. REYNOLDS CO., INC. (a corporation), and L. DINKELSPIEL CO., INC. (a corporation), *Appellants,* vs. A. F. LIEURANCE and PHILIP A. HERSHEY as Receivers of R. A. Pilcher Co., Inc. (a corporation), Bankrupt, *Appellees.*	In Equity No. 5660

REPLY BRIEF OF A. F. LIEURANCE, RECEIVER, AND EDWARD R. ELIASSEN, ATTORNEY FOR THE RECEIVERS OF R. A. PILCHER CO., INC.

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Central Bank Building, Oakland,
CROSBY & CROSBY,
Central Bank Building, Oakland,
Attorneys for Receiver A. F. Lieurance, and Edward R. Eliassen Attorney for Receivers.

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IN THE

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WALTON N. MOORE DRY GOODS CO. (a corporation), J. H. NEWBAUER & COMPANY (a corporation), G. W. REYNOLDS CO., INC. (a corporation), and L. DINKELSPIEL CO., INC. (a corporation), *Appellants,* vs. A. F. LIEURANCE and PHILIP A. HERSHEY as Receivers of R. A. Pilcher Co., Inc. (a corporation), Bankrupt, *Appellees.*	In Equity No. 5660

REPLY BRIEF OF A. F. LIEURANCE, RECEIVER, AND EDWARD R. ELIASSEN, ATTORNEY FOR THE RECEIVERS OF R. A. PILCHER CO., INC.

The title of this cause, as set forth in the Transcript of Record, and in Appellants' Opening Brief filed herein, is incorrect in this:

FIRST: It designates R. A. Pilcher Co., Inc., as a bankrupt;

SECOND: It designates A. F. Lieurance and Philip A. Hershey as Receivers of R. A. Pilcher Co., Inc. (a corporation), Bankrupt, as Appellees; and

THIRD: It designates Philip A. Hershey as a Receiver.

The facts are:

FIRST: This is not a proceeding in bankruptcy, but a proceeding in equity;

SECOND: Neither one of these gentlemen is a Receiver, nor has he ever been a Receiver, of R. A. Pilcher Co., Inc. (a corporation), Bankrupt. This is a Receivership of R. A. Pilcher Co., Inc., and the Receivers are A. F. Lieurance and Arthur F. Gotthold. Further, A. F. Lieurance, Receiver of R. A. Pilcher Co., Inc., and Edward R. Eliassen, Attorney for the Receivers of R. A. Pilcher Co., Inc., are the Appellees.

THIRD: Philip A. Hershey is not now, nor has he ever been, a Receiver, either of R. A. Pilcher Co., Inc., or of R. A. Pilcher Co., Inc. (a corporation), Bankrupt, and is not one of the Appellees herein.

We accept as substantially correct the statement in Opening Brief for Objecting Creditors, as set forth on pages 1, 2 and the first paragraph on page 3 thereof, except the statement in the last paragraph on page 2 thereof wherein they state that A. F. Lieurance * * * employed Edward R. Eliassen to act as *his Attorney* as *one of the two Receivers,* and, in this regard, we state that said A. F. Lieurance employed Edward R. Eliassen to act as the Attorney for the two Receivers, as appears in the "Order in Ancillary Proceedings Appointing Receivers etc.," set forth on pages 31 to 36 inclusive, Vol. I of Transcript, wherein it appears that a verified petition of A. F. Lieurance was filed on behalf of himself and Arthur F. Gotthold

petitioning for the appointment of said A. F. Lieurance and Arthur F. Gotthold *as Receivers* of the Defendant R. A. Pilcher Co., Inc., in said proceeding in Ancillary Proceedings, and that Edward R. Eliassen, Esq., represented the said Petitioner; and, as further shown by the "Order Continuing Receivers and Making them Permanent," appearing on pages 36 to 39 inclusive, Vol. I of the Transcript, wherein it appears on page 38: "Four. ORDERED, ADJUDGED AND DECREED that the appointments of Philip A. Hershey & Co., as Accountants, and Edward R. Eliassen, Esq., as Attorney for the *Receivers,* be and they are hereby confirmed and approved." (Italics ours.)

QUESTIONS INVOLVED IN THIS APPEAL.

As to the questions involved in this Appeal, it is our understanding that they are as set forth in the Opening Brief for Objecting Creditors under this heading, except that the allowance of $30,000.00 fixed and allowed by the Judgment and Decree of the Trial Court, as compensation to be paid Edward R. Eliassen, was fixed and allowed to him as Attorney for *Receivers* A. F. Lieurance and Arthur F. Gotthold.

STATEMENT OF THE CASE.

We deem the STATEMENT OF THE CASE contained in Opening Brief for Objecting Creditors not only incomplete, but, in many instances, inaccurate and unsupported by the record, and, therefore, on behalf of the Appellees, we offer the following:

The R. A. Pilcher Co., Inc., was a merchandising institution, existing under the laws of the State of Delaware. It was engaged in the business of conducting a chain of Department Stores, all of which were located in the States of Oregon, Washington and California, to wit: Three stores in California, located at Stockton, Turlock and Oroville; seven stores, located in the following towns in Washington: Yakima, Tacoma, Bremerton, Monroe, Aberdeen, Everett and Wenatchee; six stores, located in the following towns in Oregon: Klamath Falls, Eugene, Pendleton, Roseburg, Portland and Albany. These stores were classed as general merchandise stores, and their stocks were made up of dry goods, shoes, clothing, ladies' ready to wear, men's ready to wear, men's furnishing goods, ladies' and children's furnishing goods, notions, bedding, hats, caps and other lines usually found in a department store.

R. A. Pilcher had formerly been in the employ of J. C. Penney Company, a company engaged in conducting a system of so-called chain stores.

When R. A. Pilcher Co., Inc., became financially embarrassed, a meeting of its creditors was called and took place in New York City. The total amount of indebtedness of R. A. Pilcher Co., Inc., at that time was approximately $725,000.00. Its assets, including money in bank, merchandise, store fixtures, etc., were believed to exceed in value the total amount of its indebtedness. Very shortly before that time, one or more of its stockholders had purchased additional stock to the amount of $75,000.00, and the whole of that amount was then on deposit to its credit in a

New York bank. But it was then indebted to that same bank in an amount a little in excess thereof.

R. A. Pilcher represented to the creditors that he believed certain stockholders would purchase enough additional shares of stock to enable him to refinance the concern satisfactorily and continue its business, if the creditors would agree to an extension of one year's time for the payment of their respective debts. A few attachment suits by small creditors had already been commenced and other similar suits were being threatened, and the great bulk in amount of creditors concluded that it would be advisable to have temporary Receivers appointed, until an agreement for the aforesaid extension of one year's time for the payment of debts (which they favored) could be circulated among and signed by the respective creditors for the purpose of enabling Mr. Pilcher to reorganize and refinance R. A. Pilcher & Co., Inc., as aforesaid.

Accordingly, this suit was thereupon originally instituted in the United States District Court in and for the Southern Division of the State of New York, and Mr. A. F. Lieurance and Arthur F. Gotthold were appointed temporary Receivers. Mr. Lieurance had, for a number of years, been a stockholder in the J. C. Penney Co., and had been in its employ and thoroughly acquainted with the chain store business, and Mr. Walton N. Moore, a member of the Creditors' Committee of R. A. Pilcher Co., Inc., strongly urged him to accept the co-receivership with Mr. Gotthold, and he consented to do so. Who suggested his name to the Committee, however, was never known to him. Promptly after the appointment of A. F. Lieurance

and Arthur F. Gotthold, as temporary Receivers in New York, Ancillary Proceedings were taken in the States of California, Oregon and Washington.

At the New York meeting the creditors had elected a committee to look after their affairs, and William Fraser was elected chairman of the committee, and Messrs. McManus, Ernst & Ernst acted as the legal advisors of the committee and as attorneys for the plaintiffs in the original suit, as well as for Arthur F. Gotthold, the New York Receiver.

The creditors of the western jurisdictions also appointed a committee to represent them, and Mr. Walton N. Moore of the Walton N. Moore Dry Goods Co. became the chairman of that committee as well as a member of the original New York committee which represented all the creditors. The Walton N. Moore Dry Goods Co. was the largest western creditor. Its claim was approximately $30,000.00. This claim, however, had been guaranteed by one J. C. Brownstone, a large stockholder of the R. A. Pilcher Co., Inc., and, at the time of the hearing in this matter before the Special Master, Mr. Walton N. Moore did not know whether this claim of the Walton N. Moore Dry Goods Co., so guaranteed by J. C. Brownstone, had been paid in full or not. The Walton N. Moore Dry Goods Co. was a member of the Board of Trade of San Francisco, and Mr. Moore suggested to Mr. Lieurance when he and Mr. Lieurance first met that he thought it would be in the interest of all concerned if Mr. Lieurance as Receiver would handle the receivership in the western jurisdictions through the San Francisco Board of Trade and employ its Attorneys to

represent him as Receiver, and thus secure the benefit of their wide and varied experience in receivership matters. Mr. Moore gave as his reason for this suggestion that the San Francisco Board of Trade was owned and controlled by the wholesale and manufacturing interests of San Francisco, and that, as a great number of its members were creditors of the R. A. Pilcher Co., Inc., it was only fair and right that their organization should handle this business. Mr. Moore also suggested that Mr. Lieurance use the Attorneys employed by the Board of Trade.

Mr. Lieurance did not immediately refuse to accept Mr. Moore's suggestion, but informed him that he, Mr. Lieurance, would think the matter over carefully, and give Mr. Moore a decision at a later date. After thinking the matter over carefully, and taking into consideration the fact that he, Mr. Lieurance, was the choice for Receiver of the creditors who attended the meeting at the inception of the receivership, he felt that it was his duty to handle this business in a manner in which he felt the best results could be obtained. He also felt that if it had been the desire of the creditors to have the San Francisco Board of Trade handle the matter, they would have selected it as Receiver instead of selecting him. Mr. Lieurance further took into consideration the fact that there were other Boards of Trade or Credit Men's Associations located in other Cities, whose members were creditors, and whom he felt that he would discriminate against in employing the San Francisco Board of Trade, and/or its Attorneys, and he also felt that since it was the purpose and plan of the stockholders to re-

finance the business, and make a settlement with the creditors, that the interests of both the stockholders and the creditors would best be served by his keeping the business of the receivership separate and apart, and thus avoid further complications, and Mr. Lieurance thereupon declined to accept the said suggestions of Mr. Moore concerning the Board of Trade of San Francisco, and the employment of the Attorneys of the Board of Trade as his attorneys in said receivership.

Mr. Lieurance thereupon employed Mr. Edward R. Eliassen, of Oakland, California, as Attorney for the Receivers in the western jurisdictions, and rented offices in the Central Bank Building, in Oakland, California, on the same floor as and adjacent to the offices of Mr. Eliassen. It is not admitted by Mr. Eliassen that this was his first experience as Attorney for a Receiver, as is stated in Appellant's Opening Brief. The fact is he testified that he had theretofore served as Attorney for receivers in Bankruptcy matters. (Transcript of Record, Vol. II, page 494.)

It is admitted, however, by counsel for the Objecting Creditors that the receivership was *very efficiently* conducted, and it is also admitted by Mr. Moore and other members of the Creditors' Committee, not only that *nearly all* of the work of the receivership had been done in the *western jurisdictions,* but that it had been done with *very creditable results.*

Mr. Lieurance at once employed Mr. Philip A. Hershey, an expert public accountant (which employment was later approved by an Order of the Court) to open a set of books, establish an accounting system, and to

keep proper and complete records and accounts for the administration of the receivership, and to perform such other services as were required by the Receivers in connection with the administration of said receivership, and to do and perform, as such Accountant, all of the acts and things by him performed under said employment for the Receivers in the western jurisdictions. The work performed by Mr. Hershey is shown in his STATEMENT OF SERVICES, being Receivers' Exhibit No. 4, and set forth at pages 785 et seq., Vol. II of the Transcript.

Appellants contend that Mr. Hershey was employed under a contract at a fixed salary of $350.00 per month. (See Transcript of Record, Vol. II, page 809.) Mr. Hershey was not thus employed, as clearly appears from the testimony of Mr. Lieurance, commencing at the bottom of page 244, Vol. I, Transcript of Record, to the middle of page 246 of the same Volume.

Mr. Hershey had a large amount of other business, some of which he continued to take care of, while serving as Accountant for the Receivers in this matter, but much of which he found it necessary to postpone in order that he might give his time and attention to the work connected with this receivership.

Receiver Lieurance pursued the usual practice in chain stores of requiring all sales to be made for cash only, and of furnishing each store with blanks upon which it was required to make a daily report, and to record in the proper column on this report the daily sales, and in another column prepared for the purpose to report their local expenditures which included freight, express, light, water, heat, power, stamps,

drayage, cartage, disposal of waste, salaries to employees, and other minor expenditures for local supplies such as sweeping compound, brooms, repairs to light and plumbing fixtures, and so forth. Most of these items were required to be paid for by check on their local banks where they kept a small deposit for that purpose. However, these cancelled vouchers, together with their bank statements, were subject to withdrawal only by Receiver Lieurance, and were regularly collected at his general office in Oakland for the purpose of checking up the daily reports and of keeping the records and accounts of the Receivers in the office at Oakland. The managers of all stores were further instructed and required to retain in their cash drawers two hundred dollars as a revolving fund and change, and to deposit their daily sales in their local banks to the account of "R. A. Pilcher Co.—A. F. Lieurance Co.—Receiver," and to send each day to Receiver Lieurance at his Oakland office a draft for the full amount of each day's sales less the local daily expenditures, all of which were accounted for on the daily reports.

Some assistants were employed by Mr. Hershey to aid him in his work. He opened journals in which were recorded the sales of stores, the cash that was received, the checks that were drawn, the bank deposits that were made, petty cash expenditures, the merchandise purchases, the merchandise transfers, and a general journal for the entry of such items as would not appear in the previous journal; also set up a general ledger for each of the sixteen stores; also set up a set of books for the office of the Receiver,

those books consisting of the journals before mentioned and also a journal and ledger for that general office. The keeping of these books in this manner rendered it convenient for the Receiver subsequently to make separate accounts for each of the four western jurisdictions, if it had become necessary so to do, and such separate accounts were rendered in each of the four western jurisdictions.

Most of the transactions in all of the different stores were on a cash basis, but there were a great number of transfers of merchandise from the stores in one jurisdiction to the stores in another jurisdiction. The accounting system so installed by Mr. Hershey was such that he was able at any time, upon request, to furnish to the Receivers an accurate statement of the condition of all of these sixteen stores in the western jurisdictions. Mr. Hershey was engaged from five to ten days in formulating and installing this system. A bookkeeper was employed by the Receivers, at a wage of $27.50 per week.

Arthur F. Gotthold, as Receiver, had employed in New York City the expert accounting firm of S. D. Leidesdorf & Co., to do the work for the Receivers in the eastern jurisdiction. The accounting work, however, in the eastern jurisdiction was much less burdensome and extensive than that required in the western jurisdictions, as all of the accounting work relating to the sixteen stores in the western jurisdictions was done by Mr. Hershey; that said firm of S. D. Leidesdorf & Co. were paid for their services as expert accountants in the eastern jurisdiction the sum of $7,700.00. All of the books of account of the R. A. Pilcher Co.,

Inc., having to do with its affairs up to the time of the inception of the receivership were in New York City, and were turned over to S. D. Leidesdorf & Co., as a considerable number of the creditors of the R. A. Pilcher Co., Inc., were within the eastern jurisdiction.

Mr. Lieurance endeavored constantly for months, but without success, however, to get from his co-Receiver in New York, and Attorney Ernst, information which was essential to round out the accounting here.

The appointment of Arthur F. Gotthold and A. F. Lieurance as temporary Receivers was made by United States District Judge Augustus N. Hand on June 3, 1926, and shortly thereafter, to-wit: on or about June 9, 1926, their appointment as temporary Receivers was made by the respective western jurisdictions.

Mr. Lieurance immediately proceeded to organize the conduct of the business of the sixteen stores constituting the chain. Shortly thereafter, Mr. Ernst made a visit to California and held a conference with Mr. Lieurance and Mr. Eliassen in relation to the condition and the conduct of the business, and he reported back to Mr. Gotthold in New York City. An understanding was reached between the Receivers to the effect that Mr. Lieurance had assumed and would continue the direction of the actual conduct of the business in all of the stores and that Mr. Gotthold had assumed and would continue to direct all affairs connected with the receivership which might arise in the New York jurisdiction. Of course, the control of the receivership was to be joint nevertheless.

About the first of October, 1926, Mr. Lieurance, after conducting the business for four months, became

confident that it would be impossible for Mr. R. A. Pilcher to secure sufficient financial assistance to settle with the creditors and take back the business, and so advised his co-Receiver, and Mr. Pilcher, and Messrs. McManus, Ernst & Ernst, Attorneys, that it would be advisable to sell the stores as *going concerns,* if possible.

On August 31, 1926, Mr. Lieurance had on hand as assets of the receivership net cash amounting to the sum of $228,178.08. At that time he reported this fact to his co-Receiver, Arthur F. Gotthold, and Messrs. McManus, Ernst & Ernst, the Attorneys in New York City for the Receivers, and suggested that if the business was to be continued for an appreciable length of time, pending the refinancing of the business by the stockholders of R. A. Pilcher Co., Inc., the greater part of the cash on hand would have to be expended for merchandise to supply the stores for the coming fall season.

Receiver Gotthold and Attorneys McManus, Ernst & Ernst in turn conferred with a number of large eastern creditors and Receiver Lieurance conferred with a number of the large western creditors, and it was found that the consensus of opinion among the creditors was that the business could not be refinanced and that the cash on hand should not be expended for merchandise to replenish the stocks in the stores for future operations, and that unless the stockholders of R. A. Pilcher Co., Inc., gave definite assurance that the business could be refinanced, or a satisfactory settlement made, the cash then on hand should be preserved for distribution among the creditors, together

with the proceeds of the sale of the remainder of the property, after payment therefrom of expenses of the receivership, including Receivers' fees and Attorneys' fees. It was also the consensus of opinion of the creditors that an effort should be made to sell the stores as going concerns.

This plan was adopted and Mr. Lieurance proceeded at once to secure purchasers. To this end he composed letters containing full information dealing with the sixteen stores, both individually and collectively, and sent copies thereof not only to prospective purchasers who had made inquiries concerning the sale, but mailed copies thereof to merchants throughout the country who had made no inquiries but who were in the merchandising business and whom he felt might be interested in obtaining one or more of the stores.

Where personal contact with those prospective purchasers was possible, he called upon them personally, and, where such contact was impossible, he communicated with them both by letter and telegram. While thus making every possible effort to make the best possible sales of the stores, he kept all of the sixteen stores running, giving to these matters his services, not only during business hours, but at night and upon most Sundays and holidays. As a result of his efforts, all of the stores were sold as going concerns, some of said stores being sold separately and some in groups, the last of said sales being completed about November 3, 1926, and all of said sales being made as of August 31, 1926.

A difference of opinion had arisen between the two Receivers as to the best method of making the sales. Receiver Gotthold contended that the method of sale which would bring the best results would be to call for bids for all of the stores together as a chain; whereas, Receiver Lieurance insisted that the best price and results could be obtained by calling for bids for the stores either separately, or in groups, or as a whole, and all as going concerns. The latter plan was adopted.

Notices of Receivers' Sale were accordingly published in various newspapers throughout the four western jurisdictions, inviting prospective purchasers to present sealed bids for each store separately, or for groups of said stores, or for all of said stores as one group. Numerous bids were received, and, upon the same being opened, the highest of said bids were accepted, subject to confirmation and approval by the various Courts in the western jurisdictions, and the aggregate gross amount received for all of the stores was the sum of $257,600.00.

While efforts were being made by Mr. Lieurance in the western jurisdictions to sell these stores, Mr. Gotthold and their Attorneys, Messrs. McManus, Ernst & Ernst, were endeavoring to sell them in New York.

During this time, Mr. Lieurance kept in constant telegraphic communication with his co-Receiver, Mr. Arthur F. Gotthold, and with Messrs. McManus, Ernst & Ernst, and learned from them that the best offer they had received was $325,000.00, and this was for all of the assets of the R. A. Pilcher Co., Inc., including not only the sixteen stores but also including

the cash on hand, amounting to $228,178.07. Deducting the amount of cash on hand from the above mentioned bid of $325,000.00, leaves $96,821.93 as the best offer received in the East for the stores. The total amount received for the stores upon sale thereof as above mentioned is $257,600.00, or $160,778.07 more than the best offer received in the East for the stores, all of which fully justified the adoption of Mr. Lieurance's plan for the sale of the stores.

The stores had been conducted by the Receivers during a period of practically five months, to-wit: from June 3, 1926, to November 3, 1926, the date of the sale of the last store. While the conduct of these stores from August 31, 1926, until November 3, 1926, in order that they might be sold as going concerns, inured to the benefit of the purchasers to the extent of the net profits made on sales over the counter during that period, after payment of all carrying charges and running expenses, and after payment for all merchandise purchased during said period, still the greater benefit inured to the estate and the creditors thereof by reason of the stores having been kept open and continued as going concerns.

Shortly after this suit was originally commenced in the New York jurisdiction to procure the appointment of temporary Receivers, it was deemed necessary for the creditors to cause, and they did cause, bankruptcy proceedings to be instituted against R. A. Pilcher Co., Inc., in New York City in order to destroy prior liens of a number of small attaching creditors in the various jurisdictions. Afterwards, it was concluded by all parties concerned therein, how-

ever, that it would be equally economical and more advantageous to the creditors of R. A. Pilcher Co., Inc., to keep the administration and liquidation of its affairs through the receivership already in existence instead of transferring its operation to the bankruptcy court, and thus to a Receiver or Trustee to be appointed therein. Hence, no further steps were ever taken by the creditors to pursue the bankruptcy proceedings.

AMOUNT AVAILABLE FOR CREDITORS.

The net amount of money obtained by the Receivers from the liquidation of all the assets of the receivership, and which thus became available for the payment of creditors, after there should first be deducted therefrom the fees for the Receivers and their Attorneys, and other necessary expenses of the receivership, was the sum of $466,980.40.

The total amount of all creditors' claims, general and preferred, filed with the Receivers was $751,-860.09; and the total amount of these claimed as general claims was $746,043.75, and the amount allowed on the general claims was $718,794.12.

The total amount of preferred claims filed with and allowed by the Receivers was $5,816.34, and these were paid in full by the Receivers, and a dividend of 50% was paid to creditors on the amount of general claims allowed, that is to say, on $718,794.12.

TRIP OF MR. HERSHEY TO NEW YORK CITY.

This trip by Mr. Hershey was absolutely necessary, and authority was obtained from the Court to send Mr. Hershey on to New York. The books of R. A. Pilcher Co., Inc., which were all kept in the City of New York, had been permitted to lapse on the 28th day of February, 1926; that is to say, had not been kept up to date subsequent thereto and prior to the appointment of the Receivers on June 3, 1926.

Only a part of the claims against the Estate had been filed with Mr. Lieurance, and the remainder had been sent to New York; also, many of the claims in the District of California had been filed with the San Francisco Board of Trade, and they, instead of filing these claims with Mr. Lieurance in California, had sent them to the Receiver in New York, thus causing delay and confusion. It was very difficult to coordinate the business of the Receivers with part of the claims in New York, and part of them in Oakland.

The original books of the Company being in New York, Mr. Lieurance had no means of checking the claims to determine their correctness. He made numerous attempts to get from his co-Receiver in New York information showing accurately the amount of indebtedness as shown by the books of the Company, and other information necessary to the handling of the claims. Being unsuccessful in obtaining this information, realizing that time was being lost, and that further complications would arise as a result of these records being scattered, Mr. Lieurance, with the authority of the Court, sent Mr. Philip A. Hershey, Accountant for the Receivers, to New York for the

purpose of going over the books of the Company, bringing the accounts up to date, checking them up with the claims, and doing whatever was necessary to get the accounts reconciled with the claims and know where things stood; to make an audit of the accounts, as shown by the books of the R. A. Pilcher Co., Inc., and obtain other necessary information in connection with the verifying of the claims that had been filed, and were still to be filed against the Estate.

Upon Mr. Hershey's arrival in New York, *he found that comparatively nothing had been done toward an audit of the books and accounts of the Company.* It required approximately two weeks for him, working day and night, to compile an accurate and authentic statement of the various accounts, as shown by the books of the Company, and he discovered, among other things, that the total liabilities of the Company were approximately $140,000.00 *more* than the reports from the East had theretofore shown.

Mr. Lieurance knew, and had known, that the books and records of the R. A. Pilcher Co., Inc., had been for some time in the hands of a firm of Accountants, who had been employed by Receiver Gotthold, to-wit: the firm of S. D. Leidesdorf & Co.; that some of the creditors were located in and around New York City. Knowing these things, he endeavored on numerous occasions to obtain from New York City the information above referred to, but was unsuccessful in his efforts. The answers he received to his requests were that the information was not ready. Mr. Hershey was away from Oakland on this trip during a period of a total of thirty-eight days. While in New York

City, he worked with S. D. Leidesdorf & Co. in their offices upon the books and records of R. A. Pilcher Co., Inc., for the purpose of obtaining all of the above mentioned information which Mr. Lieurance had been constantly seeking through correspondence, but was unable to obtain.

COMPENSATION OF THE RECEIVERS AND THEIR ATTORNEYS.

Certain conferences, and certain telegraphic and letter correspondence were had between the parties in interest in relation to the *ad interim* allowances on account of Receivers' fees and Attorneys' fees, which conferences and correspondence commenced before any of the applications were made in the western jurisdictions for such allowances, extended through the period while applications were being made in the western jurisdictions for such allowances, and beyond the time when the last of said *ad interim* allowances was made in the western jurisdictions.

In the "Objections and Exceptions to Final Account and Report of the Receivers, also to the Petition for Allowance of Further Fees and Compensation to Receiver Lieurance or to Edward R. Eliassen, Attorney for the Receivers," filed herein by the Objecting Creditors, they set up, in support of their said Objections and Exceptions, the aforesaid conferences and communications.

Much of this correspondence appears in the Transcript of Record, and is set forth in the Opening Brief for Objecting Creditors filed herein, at pages 13 to 38, inclusive, and, in relation to which corre-

spondence, they state in their Opening Brief, page 13, "The following telegraphic and letter correspondence between the parties in interest explains quite fully the manner in which the amount allowed by the trial court as fees to Receiver A. F. Lieurance and his Attorney, Edward R. Eliassen, was reached."

The Special Master eliminated from his consideration, so far as the final fixation of the fees of Receiver A. F. Lieurance, and his Attorney, Edward R. Eliassen, are concerned, all of the conferences and the communications above referred to, considering them immaterial (Transcript, Vol. I, page 237; also page 180), and it is therefore apparent that these communications and conferences do not fully or at all explain "the manner in which the amount allowed by the trial court as fees to Receiver A. F. Lieurance and his attorney, Edward R. Eliassen, was reached."

The amount of the *ad interim* allowances is not one of the issues involved in this appeal, and, therefore, the manner in which the amount of these *ad interim* allowances was reached is immaterial.

Counsel for the Objecting Creditors at the hearing before the Special Master (Transcript of Record, Vol. I, page 318), stated: "The only materiality I feel it has is, it is cross-examination, and has as such a bearing on the weight of the testimony given by Mr. Eliassen and Mr. Lieurance respectively in regard to the value of the services."

A meeting was held at the office of Mr. Kirk, Attorney for the San Francisco Board of Trade, on December 9th, at which meeting were present Mr. Kirk,

Mr. Walton N. Moore, Mr. Lieurance and Mr. Eliassen.

A controversy exists between Mr. Kirk and Mr. Moore on the one hand, and Mr. Lieurance and Mr. Eliassen on the other, as to the understanding reached at this meeting, with regard to the filing of applications for *ad interim* allowances to the Receivers and their Attorney in the western jurisdictions, and as to what transpired at said meeting; the latter contending that it was understood and agreed that they should proceed at once to file Petitions for and obtain *ad interim* allowances in all of the western jurisdictions, and then to report the aggregate thereof to Mr. Walton N. Moore; and further contending that it was agreed that the first of these applications would be made on the following day, that is to say, December 10th, to the United States District Court for the Northern District of California, Southern Division, at San Francisco, and that, having procured the *ad interim* allowances in San Francisco, Mr. Lieurance and Mr. Eliassen should proceed at once to the Northwest and file like applications and procure Orders for *ad interim* allowances in those various jurisdictions, leaving the amounts of these allowances to the judgment of the various Courts; and further contending that Mr. Kirk, the Attorney for the Board of Trade of San Francisco, suggested that it would not be necessary for him to be present upon the hearing of the aforesaid applications for *ad interim* allowances; whereas, it is contended by the former that it was not understood that Mr. Lieurance and Mr. Eliassen should proceed with these applications at that time,

but that they should first confer further with the Creditors' Committee for the purpose of determining what sums should be sought as *ad interim* allowances from the Courts in the western jurisdictions. The testimony of these gentlemen is conflicting concerning what was said and done at that meeting in relation to the obtaining of *ad interim* allowances,—and growing out of this misunderstanding, has come the efforts on the part of the Objecting Creditors to impugn the integrity and good faith of Mr. Lieurance and Mr. Eliassen, and we believe that it is for this purpose only, and not for the purpose of determining the reasonable value of their respective services in this matter, that the letter and telegraphic correspondence have been introduced into this proceeding.

The applications for *ad interim* allowances were made in accordance with what Mr. Lieurance and Mr. Eliassen understood and believed to be the agreement as reached at said meeting in the office of Mr. Kirk, on December 9, 1926. The parties in interest were waiting in the East to know the aggregate of the *ad interim* allowances in the western jurisdictions in order to apprise Judge Hand as to their amount. It was agreed by Mr. Moore, Mr. Kirk, Mr. Lieurance and Mr. Eliassen that these amounts would be left to the judgment of the respective Courts in the western jurisdictions. These amounts could not be determined until the applications were made and hearings had.

There were two letters, however, which were introduced in evidence, but neither of which is set forth in Appellants' Opening Brief. The first of these letters

was from Roberts, Johnson & Rand, of St. Louis, Missouri, dated December 29, 1926, to Mr. A. F. Lieurance, and was introduced in evidence by counsel for the Objecting Creditors, and appears at pages 502 and 503, Vol. II, Transcript of Record. The second of these two letters bears date January 10, 1927, being the reply of Mr. Lieurance to the first of said two letters, and was introduced in evidence by Plaintiffs, and appears at pages 505 to 512, inclusive, Vol. II, Transcript of Record. We respectfully invite the attention of this Honorable Court to both of these letters, and particularly to that of Mr. Lieurance, which we feel is a complete answer to the unfounded charges against Mr. Lieurance and Mr. Eliassen concerning the *ad interim* allowances.

The first of these *ad interim* allowances was applied for and made in the United States District Court in and for the Northern District of California, Southern Division, on December 10, 1926. Mr. Lieurance, in his testimony at page 446, Vol. I, Transcript of Record, describes *generally* what occurred in the various Courts of the four western jurisdictions upon these applications. We quote here from the testimony of Mr. A. F. Lieurance:

> "I accompanied Mr. Eliassen into the various jurisdictions when applications were made for temporary allowances. We went into the courts in the ancillary jurisdictions, to ask for allowances on account to the attorney and the Receivers, and went through with what I suppose is the regular form of proceeding in the matter in court. I was put on the witness-stand by Mr. Eliassen and asked a number of questions, whether I was the Receiver, and if I qualified,

and if the report was true. I suppose that is the natural course of such things. I could not repeat it all, word for word, but that is the nature of it. Included in this was the application to pay a dividend of 40 per cent. The Court asked about what amount of money there was on hand, and whether or not we could safely pay that large a dividend, and asked a number of questions in regard to the condition of the estate, and how the receivership was progressing, and [344] took whatever interest the Court felt was necessary. They asked how much compensation the attorneys and the Receivers were asking for on account. When that question has been asked me I have said, without exception, that that is a matter that is to be left entirely to the discretion of the Court, whatever seems to the Court fair and equitable is all right.";

and

As shown on page 447, Vol. I of the Transcript of Record, he states more specifically what occurred upon the application to the United States District Court in and for the Northern District of California, Southern Division, as follows:

"As I remember it, the Judge asked if an allowance had been made in any other jurisdiction, and Mr. Eliassen replied there had not been, but that an application (being the application of Receiver Gotthold and the attorneys, Messrs. McManus, Ernst & Ernst, referred to in the above mentioned conferences and correspondence) had been made for an allowance on account in New York. He asked what the amount was, and Mr. Eliassen said $10,000. The Court said, 'I will make an order to that effect if that is satisfactory.' Mr. Eliassen said: 'Anything that satisfies the Court.' I was asked how much I was asking for. I said to the Court that this was a matter to be heard in four jurisdictions, that I had

set no figure, and that it was a matter to be left to the Court. He said he understood that. So he said '$10,000 to the receiver.' I asked him what division he would make of that, that I had done all the work in the western jurisdictions, and Mr. Gotthold had done none of it. He said, 'Why not split it 50-50?' I said, 'Do you think that would be fair?' After some hesitation he said, 'No, make it 75 and 25.' That ended the conversation, or, rather, that ended the hearing. I don't think there was anything else after that. The order was made and that was the end of it.";

and

As shown on pages 447 and 448, Vol. I of the Transcript of Record, he states more specifically what occurred upon the application to the United States District Court in and for the Eastern District of Washington, at Spokane, as follows:

"We went to Portland. Judge Bean was not at home; he was away, and would not be back for some three or four days, or whatever time it was. We made an appointment there at that particular time to see him a subsequent date. We proceeded to Spokane. We had a hearing before Judge Webster. Judge Webster asked how much we were asking for [345] after he had approved the payment of the 40 per cent dividend, and I told him that that was a matter that was to be left entirely to the Court. I emphasized that fact. He said he understood that. He commented upon the result of the administration, and said that he was ready to fix the fee, and pressed me for an answer as to how much I would expect. I repeated that that was a matter that was to be left to the Court, whatever to the Court seemed fair and equitable would be satisfactory. He said, 'You must have some idea what the services are worth.' I said to him, 'This is a matter of allowance on account, as I understand it.' He said,

'Well, what would you charge for the services?' I said, 'If I were setting up a fee I would set it at 5 per cent of the gross sales for the services of the receivership.' He asked some questions regarding whether or not it was to be final, or how much more work there would be, and I told him I didn't know, but so far as I knew the next dividend could be paid and the matter closed up. He said he thought that was fair and right, and made the allowance. We proceeded to Seattle, and Judge Neterer——

The MASTER. Q. At Spokane, was anything said about Mr. Eliassen's fee?

A. Mr. Eliassen said to the Court, whatever the Court felt was right and fair would be all right. There was the same procedure that had taken place in San Francisco here. That was followed substantially.";

and

As shown on pages 449 and 450, Vol. II of the Transcript of Record, he states more specifically what occurred upon the application to the United States District Court in and for the Western District of Washington, at Seattle, as follows:

"When I say he was more particular, I mean he took more time and went into the matter more thoroughly. After the regular procedure, just the same as had taken place in the other courts, that is, the presenting of the statement, or the report, he questioned me at some length regarding the result obtained in the receivership. I told him the result that we had obtained. As a matter of fact, he had passed upon the work that had gone on before, and was highly pleased with the result of the sales, and commented upon the manner in which the estate had been handled, and said that it was one of the best that had come to his attention. He asked me how much I was asking for. I told him it was a matter to be left

entirely to the Court. He said he understood that, but I certainly had some idea what the services were worth. I refrained as long as I could, until I was asked the direct question, and felt that I had to answer as to what I would expect for the services. He also delved into the matter as to whether or not the receivership was to be closed up. I told him no, I did not believe so, but that we wanted to pay the 40 per cent dividend, and that there would be another dividend later on, and so far as I knew, the matter could be brought to a close some time, possibly, in April, or maybe earlier. He inquired about the amount of sales in that particular jurisdiction, and I gave it to him, and he took out his pencil and figured out the amount at 5 per cent on the gross sales. As I remember it, it figured up about $13.000. He said, 'I don't think anybody can object to that; however, are you going to make any other application for fees?' I said, 'I don't know, it depends on the amount of work that has to be done in the future.' He said, 'We will make this $12,000, and then if there is any other work done later on we will attend to it when the final account is heard.' So that instead of figuring it at 5 per cent he took off $1,000 and made the fee $12,000.";

and

As shown on pages 450 and 451, Vol. II of the Transcript of Record, he states more specifically what occurred upon the application to the United States District Court in and for the District of Oregon, at Portland, as follows:

"Virtually the same thing prevailed in the court in Portland [347] Oregon, Judge Bean took considerable interest in the affair, and asked a number of questions regarding the estate, and the results obtained. He asked what had been done in the other jurisdictions, and I told him. He

said he thought that was fair and equitable, and he did not believe anybody could object to that, and that he would make the order for 5 per cent on the sales, and make that the final compensation so far as my compensation would be concerned. He figured the 5 per cent on the gross sales. That is how it comes to be an odd figure. That is the way these allowances were obtained. There was no breach of confidence, and no effort made to deceive the Court, and there was nothing done to influence the Court in any manner, except just as I have told you.

That is substantially what has happened in every jurisdiction."

It will be observed that together with these applications for *ad interim* allowances on account of Receivers' fees and Attorneys' fees, applications were also made for orders from the respective Courts directing the payment of preferred claims, and directing the payment of a 40 per cent dividend to the general creditors.

In the Orders made by the various Courts in the western jurisdictions awarding *ad interim* allowances to the Receivers, it was provided in each case, except in the Eastern District of Washington, that a portion of said allowance go to Mr. Gotthold.

An agreement was reached between Mr. Lieurance and Mr. Gotthold that all allowances to the Receivers in the western jurisdictions should belong to Mr. Lieurance, and all of those awarded to the Receiver in the original jurisdiction should belong to Mr. Gotthold. The first knowledge, however, that Mr. Lieurance received from Mr. Gotthold that such a plan was acceptable to Mr. Gotthold reached Mr. Lieurance

while in Portland, Oregon, on December 16th, by wire from Mr. Gotthold from New York, dated December 16th, which was received at Oakland, California, at 9:44 A. M., and was forwarded to Mr. Lieurance at Portland, Oregon, on that date.

Appellants, in their Opening Brief, at the bottom of page 27 thereof, contend that it is a fair legal presumption that Mr. Lieurance received this telegram at Portland sometime before 2:00 o'clock P. M. on December 16, 1926, and prior to the hearing of the application for *ad interim* allowances before the United States District Court of Oregon, which, they say, occurred after 2:00 o'clock P. M. of that day. At the bottom of page 28 of Appellants' Brief, Mr. Lieurance is criticised for not having advised Judge Bean in Portland of the aforesaid Agreement between himself and Mr. Gotthold.

It is unfair to presume that this wire reached Mr. Lieurance even as early as 2:00 o'clock P. M. on December 16th, as his secretary in forwarding the telegram from his Oakland office sent it to his hotel in Portland, where it would have to await delivery to him upon his return to the hotel, in the event that he were not there when the telegram arrived, and there is nothing in the record to show that he was there when it did arrive.

The fact is that the hearing of the applications before the Court in Portland was had at 10:00 o'clock A. M. on the 16th of December, 1926 (Transcript of Record, Vol. I, page 327, testimony of Edward R. Eliassen); also, in the telegram of December 16th,

from Mr. Lieurance to Mr. Moore, page 32 of Appellants' Opening Brief, the following appears: "Work completed here this morning. Etc."

Immediately upon the completion of the applications and the securing of the Orders from all of the western jurisdictions, Mr. Lieurance sent to Mr. Walton N. Moore, at San Francisco, the above mentioned telegram, of date December 16, 1926, wherein he states the amounts allowed to Mr. Eliassen, as follows:

California jurisdiction, at San Francisco	$10,000.00
Washington jurisdiction, at Spokane	2,500.00
Washington jurisdiction, at Seattle	5,000.00
Oregon jurisdiction, at Portland	10,000.00
Total	$27,500.00

and to the Receivers, as follows:

California jurisdiction, at San Francisco (divided 75% and 25%)	$10,000.00
Washington jurisdiction, at Spokane, (division to be made at final hearing)	5,000.00
Washington jurisdiction, at Seattle, (divided $12,000.00 and $1,000.00)	13,000.00
Oregon jurisdiction, at Portland, (divided $13,500.00 and $1,000.00)	14,500.00
Total	$42,500.00

and Mr. Lieurance, from Portland, on the same day, phoned this information to Mr. Love at Seattle, who was a member of the New York Creditors' Commit-

tee. Upon receipt of this telegram by Mr. Moore, there was started a further line of correspondence, both by wire and letter, some of which is set forth in the Opening Brief for Objecting Creditors, and which became, to some extent, quite personal on the part of Mr. Moore and Mr. Kirk. As a part of this Correspondence, there was a letter addressed from Mr. Kirk to Mr. Eliassen, referred to on page 35 of the Opening Brief for Objecting Creditors, to which it is stated on page 36 of said Opening Brief that Mr. Eliassen made no reply. This letter was received at Mr. Eliassen's office during his absence, and his secretary answered it by letter to the Board of Trade, 444 Market Street, San Francisco, California, stating that Mr. Eliassen was expected back shortly at his office, and that all matters would receive his prompt attention. (Transcript of Record, Vol. II, page 493.)

Mr. Eliassen was en route from Portland to Oakland on Saturday, December 18th. (Transcript of Record, Vol. II, page 653.) The next day was Sunday. Upon his arrival at his office he saw Mr. Kirk's letter and thereupon, in response thereto and instead of writing Mr. Kirk, telephoned to Mr. Kirk arranging an interview, which interview was had on Monday, December 20, 1926, at the office of Mr. Kirk, there being present Mr. Eliassen, Mr. Lieurance, Mr. Kirk and Mr. Moore. At this interview the whole subject matter of said *ad interim* allowances and correspondence in relation thereto was discussed.

Thereafter, written Objections and Exceptions were prepared by the Objecting Creditors to the amounts

of these *ad interim* allowances, which said written Objections and Exceptions were not filed at that time, but four certain Stipulations, one to be filed in each of the Courts of the western jurisdictions, were made and entered into by and between A. F. Lieurance and Edward R. Eliassen, and the Creditors' Committee representing the eastern creditors of R. A. Pilcher Co., Inc., by Walton N. Moore, authorized representative, and Creditors' Committee representing western creditors of R. A. Pilcher Co., Inc., by Walton N. Moore, Chairman. All of these Stipulations, constituting Receivers' Exhibit 12, and received in evidence, were the same, except as to the title of the Court and the dates and amounts of the original allowances, and the amounts of the reduced allowances, respectively. A copy of only one of these Stipulations is contained in the Transcript of Record, and appears in Vol. I, page 416, et seq. thereof.

By these Stipulations, each of the original *ad interim* allowances awarded to Mr. Eliassen on account of Attorneys' fees, and each of the original *ad interim* allowances awarded to Mr. Lieurance on account of the Receivers' fees, was reduced by each of the Courts originally fixing the same respectively, and the original Orders were accordingly amended, with the result that the aggregate of the *ad interim* allowances to Mr. Eliassen was reduced to $15,000.00, and the aggregate of the *ad interim* allowances to Mr. Lieurance was likewise reduced to $15,000.00.

In and by said Stipulations, it was further provided that said reduced allowances should not be

further reduced. And in and by said Stipulations it was further provided that these respective Courts should have the exclusive right to fix the fees and compensation of the Receiver, A. F. Lieurance, and the fees and compensation of Edward R. Eliassen, Attorney for the Receivers in the above entitled proceedings, whether or not any further proceedings were taken in bankruptcy proceedings then pending, or in any other bankruptcy proceedings that might be instituted thereafter. And by said Stipulations it was further provided that the final fixation of the fees of A. F. Lieurance, as Receiver, and of Edward R. Eliassen, as Attorney for the Receivers in this matter, should be made by the said Courts respectively at the time of the hearing on the final account of the Receivers herein, and that notice of the time and place of such hearing should be given to all of the known creditors of the Defendant company by mailing notices to them at their last known addresses at least thirty (30) days before such hearing, and that no other or further fixation of their respective fees should be made by said Court in the meantime. By said Stipulations, it was further provided that these Stipulations should not be construed to be any limitation whatever upon the right of Receiver Lieurance, or of his said Attorney, Edward R. Eliassen, at the time of such final fixation of fees, to apply for or receive additional fees or compensation for services, either theretofore or thereafter rendered by them, or either of them; or upon the right of any creditor or creditors to oppose or contest any such application or applications if and when so made.

When the foregoing Stipulations were made and entered into, and the orders of the various Courts amending the original Orders of *ad interim* allowances were made and entered, the above mentioned conferences and letter and telegraphic communications were rendered immaterial so far as the question of the reasonable value of the services rendered by Mr. Lieurance, as Receiver, and by Mr. Eliassen, as Attorney for the receivers, in this matter are concerned.

The Receivers had filed in each of the four western jurisdictions their final account covering the entire receivership, together with their final report accompanying said account, and together with the application of Receiver Lieurance for additional compensation to himself and for additional compensation for Mr. Eliassen, his Attorney, and due notice thereof was given to all of the creditors in pursuance of said Stipulations. The Objecting Creditors also filed their Objections and Exceptions to each of the said final accounts of the Receivers, and the application for additional compensation to Receiver A. F. Lieurance and to Mr. Eliassen, Attorney for the Receivers, in each of the aforesaid four western jurisdictions.

Stipulations were made and entered into by the parties in interest in each of the western jurisdictions, by which it was agreed that all of these matters should be heard and determined together in the United States District Court in and for the Northern District of California, and Orders were made in said Courts respectively to this effect. (See pages 164 to 168, inclusive, Transcript of Record, Vol. I.)

On September 20, 1927, an Order of Reference to Master was made in the United States District Court in and for the Northern District of California, Southern Division, referring said matters to Honorable Harry M. Wright, Esq., as Special Master, to take the testimony and report his findings and conclusions thereon to the Court, and further ordering that said matters be set for hearing before said Special Master on October 11, 1927, subject to the convenience of said Special Master.

HEARING BEFORE SPECIAL MASTER.

The hearing was accordingly set for October 11, 1927, and was commenced on that day, and was further heard on October 19, 1927, October 20, 1927, and October 21, 1927, whereupon at the request of Mr. Heney the matter was submitted on briefs, the final brief of Objecting Creditors being filed on January 3, 1928.

At the outset of the hearing it was stipulated and agreed that the Special Master should also return the evidence taken. Mr. Joseph Kirk, attorney for the San Francisco Board of Trade, and one of the attorneys of record for objecting creditors, was seriously ill during the hearing and his testimony on certain issues was stipulated into the record.

That a full and complete hearing was had before the Special Master upon all of the objections and exceptions urged by the Objecting Creditors against the final Account and Report of the Receivers, and

against the Application of Mr. Lieurance for further allowances to him on account of his fees for services, and his Application for further allowances to Mr. Eliassen for his fee as attorney for the Receivers, and against the payments made to Mr. Hershey, is evidenced by the Transcript of the Record filed herein.

From the report of the Special Master it clearly appears that all of the testimony produced before him was thoroughly analyzed and considered before making his report, which appears upon pages 169 to 209, inclusive, Vol. I of the Transcript of Record.

Full, complete and detailed statements in writing of the services rendered by Mr. Lieurance as Receiver, by Mr. Eliassen as attorney for the Receivers in the western jurisdictions, and by Mr. Hershey as accountant for the Receivers in the western jurisdictions were presented in evidence before the Special Master, which statements were supplementd by the oral testimony of these three gentlemen. No claim is made by the Objecting Creditors that the services of these three gentlemen as stated in their written statements and in their testimony respectively were not rendered by them.

Experts were called by both sides concerning the value of all of the services rendered by Mr. Eliassen as attorney for the Receivers in the western jurisdictions. Experts were called to testify as to the value of all of the services rendered by Mr. Hershey as accountant for the Receivers in all the western jurisdictions. No experts were called to testify to the

value of the services of Mr. Lieurance rendered by him in connection with this receivership.

It will be noted that Mr. Eliassen, in connection with his services rendered to the Receivers, employed other counsel to assist him whose fees amount to $2,650.00, all of which Mr. Eliassen is called upon personally to pay.

The Special Master, in his Report, found the reasonable value of all of the services so rendered by Mr. Eliassen to be the sum of $30,000.00, or $15,000.00 in addition to the $15,000.00 already received by him; he further found the reasonable value of all the services of Mr. Lieurance, as Receiver, to be the sum of $35,000.00, or $20,000.00 in addition to the $15,000.00 already received by him, and he further found the sum of $10,750.00 to be the reasonable value of all the services rendered by Mr. Philip A. Hershey, and made the following recommendations in his report:

> "(1) The final and supplemental reports and accounts of the Receiver should be approved as rendered.
>
> (2) The Receiver should be directed to pay out of funds in his hands:
>
> (a) To Philip A. Hershey, his accountant, $769.71, in full of all demands.
>
> (b) To Edward R. Eliassen the sun of $15,000.00 in full of all services as attorney for the Receiver.
>
> (c) To A. F. Lieurance, in full of all services as Receiver, the sum of $20,000.00.
>
> (d) To the Special Master herein such reasonable compensation as to this Court shall

seem proper for his services herein, not exceeding $1,500.00.

(3) The Receiver shall submit to the Court a final supplemental account of his receipts and disbursements, and pay any balance in his hands and transfer any property other than money in his hands belonging to the receivership as the Court may direct; and thereafter be discharged."

Objections and Exceptions to the Master's Report were filed by the Contesting Creditors, and, after a hearing thereon in the United States District Court in and for the Northern District of California, Southern Division, at which hearing Mr. Francis J. Heney, Mr. Grant H. Wren and Mr. C. A. Shuey, attorneys representing the Objectors, and Messrs. Edward R. Eliassen and Peter J. Crosby, Attorneys representing Receiver Lieurance, were present, the said Court rendered its Judgment and Decree, wherein it overruled the Objections and Exceptions to the said Report and Findings of the Special Master, and wherein it approved, ratified and confirmed the Report and Findings of the Special Master, and wherein it further ordered, adjudged and decreed as follows:

"(1) That the final accounts and reports of the Receivers be, and they are, hereby approved, ratified and confirmed as rendered.

(2) That the supplemental account and report filed herein on behalf of the Receivers be, and it is, hereby approved, ratified and confirmed.

(3) That the sum of Thirty Thousand Dollars ($30,000) be, and it is, hereby fixed as the compensation to be paid to Edward R. Eliassen, attorney for the Receivers, in full for his services

rendered in the above-entitled matter in the above-entitled Court and in the jurisdictions of Oregon and Washington hereinabove mentioned; that the said Edward R. Eliassen has already received Fifteen Thousand Dollars ($15,000) on account of such services and that the Receiver A. F. Lieurance be, and he is, hereby authorized and directed to forthwith pay to the said Edward R. Eliassen the balance of Fifteen Thousand Dollars ($15,000) in full for all services rendered as attorney for the Receivers.

(4) That the sum of Thirty-five Thousand Dollars ($35,000) be, and it is, hereby fixed as the compensation of A. F. Lieurance, as Receiver in the above-entitled proceeding in the above-entitled Court and in the Courts in the aforesaid jurisdictions of the States of Oregon and Washington; that he has already been paid Fifteen Thousand Dollars ($15,000) on account and that he is hereby authorized and directed to pay to himself forthwith the balance of Twenty Thousand Dollars ($20,000) in full for all services rendered by him as receiver in the premises.

(5) That Philip A. Hershey, accountant for the Receivers, be paid the further sum of Seven Hundred and Sixty-nine and 71/100 Dollars ($769.71) in full for his services, and the said Receiver A. F. Lieurance is hereby ordered and directed to pay said sum forthwith to the said Philip A. Hershey in the premises.

(6) That the said Receiver A. F. Lieurance submit to the above-entitled Court a final supplemental account of his receipts and disbursements and pay any balance in his hands, together with the sum of Seventeen Hundred Dollars ($1,700) (which said Receiver and his attorney are informed is the apparent deficit for expenses of administration incurred at New York and which said sum they have agreed to pay out of their allowances) to Receiver Arthur F. Gott-

hold, at New York, and immediately thereafter be discharged.

Dated, this 27th day of March, 1928."

At the last mentioned hearing, the Affidavit of Mr. Grant H. Wren, set forth on pages 43 and 44 of Appellants' Opening Brief, was filed and received in evidence. This Affidavit refers to certain disputed claims then pending in the United States District Court in the original jurisdiction, and also to certain expenses for Mr. Cardozo, as Master, and balances alleged to be due to Mr. Gotthold for moneys which he had personally expended. In this Affidavit are set forth excerpts from a telegram to Affiant from Messrs. McManus, Ernst & Ernst, bearing date the 27th day of January, 1928, and from a letter of date about the 8th day of February, 1928, from Messrs. McManus, Ernst & Ernst to Mr. William Fraser, chairman of the Eastern Creditors' Committee, and which communications referred to the claims and expenses above mentioned.

In these communications so referred to in said Affidavit, it is urged that moneys be reserved in the western jurisdictions for the purpose of meeting these claims and expenses. Upon said last mentioned hearing, the matter of these expenses and disputed claims was considered, and the attention of the trial Court was called to a telegram of Mr. Gotthold to Mr. Lieurance, under date of March 2, 1928, from which telegram it appeared that approximately $2,800.00 would be required to meet the above mentioned expenses in the New York jurisdiction. It

was also shown to the trial Court that after the payment of the allowances recommended by the Special Master, and the payment of the miscellaneous expenses, there would be in the hands of the Receivers in the western jurisdictions $1,124.18, thus leaving an apparent deficit of about $1,700.00 to meet the expenses in the eastern jurisdiction. Thereupon, Mr. Eliassen and Mr. Lieurance agreed to contribute the sum of $1,700.00 for the purpose of meeting said apparent deficit, and thereupon an Order was made in the premises, based upon such offer to contribute, and thereafter said contribution was made as is shown by the supplemental and final account of the receivers, at pages 232 to 235, inclusive, Vol. I, Transcript of Record.

DISPUTED CLAIMS PENDING BEFORE SPECIAL MASTER IN NEW YORK.

At the time of the hearing of the Objections and Exceptions of the Objecting Creditors to the report of Honorable H. M. Wright, Special Master above referred to, a report had not yet been made by Honorable Michael J. Cardozo, Jr., Special Master in New York, before whom these disputed claims were pending.

In the interest of justice, we deem it proper to apprise this Honorable Court of subsequent proceedings in this matter in the United States District Court, Southern District of New York, in which an Order was made by Honorable Augustus N. Hand, dated December 10, 1928, the effect of which, we be-

lieve, completely eliminates the question raised by the Objecting Creditors in their Brief, at page 46 thereof, wherein they say "No provision has been made for the payment of the additional $10,000.00 of creditors' claims which are in litigation." A copy of said Order came to the hands of A. F. Lieurance from Messrs. McManus, Ernst & Ernst, Attorneys for the Receivers in the eastern jurisdiction, of which said order the following is a copy:

"United States District Court
Southern District of New York

Sidney Gilson, Herman Avrutine and Samuel Avrutine, co-partners engaged in business as National Garment Co., Complainants, -against- R. A. Pilcher Co., Inc., Defendant.	In Equity No. 37/146

The Receivers herein having filed their final account, and reports having heretofore been filed on behalf of the Receivers, and it appearing that an order has heretofore been entered on March 27, 1928, approving and ratifying the final accounts and reports of the receivers in all ancillary proceedings, and it further appearing that insufficient moneys have been received by the Receivers in this proceeding to meet all of the obligations incurred or undertaken by the Receivers, and that an agreement has been made to reduce the amount to be paid to URIE F. MANDLE, one of the claimants, and it further appearing that MICHAEL H. CARDOZO, JR., the Special Master heretofore appointed herein, has reported to this

Court his findings and such findings have been confirmed excepting only the claim of URIE F. MANDLE, above referred to, and it appearing that consent to the entry of this order has been given on behalf of the claimant URIE F. MANDLE,

NOW, THEREFORE, after hearing MCMANUS, ERNST & ERNST, ESQS., by WALTER E. ERNST of counsel, on behalf of the Receivers, it is hereby

ORDERED AND DECREED that the final accounts of the Receivers be and they hereby are approved, ratified and confirmed as rendered; and it is further

ORDERED AND DECREED that the said ARTHUR F. GOTTHOLD and A. F. LIEURANCE as Receivers herein, on making the payments hereinafter set forth, be and they hereby are discharged as such Receivers and their bond or bonds heretofore given are cancelled and discharged; and it is further

ORDERED AND DECREED that out of the funds now in his possession, as set forth in the annexed account, ARTHUR F. GOTTHOLD, as Receiver, shall make the following payments: to MICHAEL H. CARDOZO, JR., for his services as Special Master, the sum of One thousand Dollars ($1,000); to ROBERT F. STEPHENSON, as Referee, the sum of One hundred eighty-four and 75/100 Dollars ($184.75); and that the balance in his possession, as set forth in the annexed account, to-wit: Four hundred ninety-nine and 76/100 dollars ($499.76) be paid to URIE F. MANDLE, or his attorneys, in full and complete settlement of the claim of the said URIE F. MANDLE against the defendant above named.

Dated, New York, N. Y., December 10, 1928.

Augustus N. Hand,
United States Circuit Judge."

We deem it further proper to apprise this Honorable Court of the fact that on November 21, 1929, Attorney Edward R. Eliassen received from Arthur

F. Gotthold, one of the Receivers in this matter, the following telegram:

"Edward R. Eliassen,
1203 Central Bank Bldg.,
Oakland, Calif.

ALL CLAIMS HEARD BEFORE CARDOZO HAVE BEEN DISPOSED OF STOP MONEYS DIRECTED TO BE PAID BY ORDER JUDGE HAND DECEMBER TENTH HAVE BEEN PAID STOP THAT ORDER FINALLY DISCHARGED EQUITY RECEIVERS UPON MAKING PAYMENTS.

ARTHUR F. GOTTHOLD."

On page 42 of their Opening Brief, the objecting creditors refer to the Final Account of Receiver Lieurance, and the balance on hand as shown by said Final Account, amounting to $41,975.28.

A supplemental account, however, was filed at the time of the hearing before the Master (Master's Report, Vol. I, page 170, Transcript of Record), and, by stipulation of the parties, was considered by the Master at said hearing and in his Report, and which supplemental account was confirmed and approved by the trial Court at the hearing of the Objections and Exceptions to the Report. (See page 230, Vol. I, Transcript of Record.) This supplemental account and report are not set forth in full in the transcript, but, by stipulation, and upon an Order granted thereon, the original of said supplemental account and report, designated as Document No. 67 in the files of the Clerk of the said United States District Court, together with other documents, were transmitted to the Clerk of the United States Circuit Court of Appeals for use upon this appeal, as is indicated on page 805, Vol. II, Transcript of Record.

By this supplemental account there was shown to be a balance on hand of $38,694.86.

After the payment of the aforesaid additional allowances to Mr. Lieurance, Mr. Eliassen and Mr. Hershey, and the payment of certain expenses of the Receivership, there was finally left in the hands of the Receivers in the western jurisdictions the sum of $2,760.85, which included the $1,700.00 contributed by Mr. Lieurance and Mr. Eliassen, and which said sum of $2,760.85 was forwarded to Arthur F. Gotthold, co-Receiver at New York, on or about the 30th day of March, 1928.

In the Opening Brief of Objecting Creditors at page 45, computations appear showing the aggregate sums allotted in both jurisdictions to attorneys and receivers, the aggregate total thereof amounting to $95,000.00, and the statement is made that this amount was "one-fifth of the total net amount obtained by the Receivers from the sale of assets which were thus made available for payment of dividends to creditors, receivers' and attorneys' fees, and expenses of administration."

They fail to state, however, that the gross amount of cash received by the Receivers and handled by Receiver A. F. Lieurance was approximately $900,000.00.

ARGUMENT.

The questions involved upon this appeal are:

FIRST—Did the trial Court err in any of the particulars set forth by the Appellants in their

ASSIGNMENT OF ERRORS, appearing in Transcript of Record, Vol. II, pages 808 to 811, inclusive?

SECOND—Was there any manifest abuse of discretion on the part of the trial court in the exercise of its discretion in fixing the sum of $30,000.00 as the reasonable value of all of the services of Edward R. Eliassen as attorney for the Receivers?

THIRD—Was there any manifest abuse of discretion on the part of the trial court in the exercise of its discretion in fixing the sum of $35,000.00 as the reasonable value of all of the services of A. F. Lieurance, Receiver?

EMPLOYMENT OF PHILIP A. HERSHEY AS ACCOUNTANT FOR THE RECEIVERS, THE SERVICES RENDERED BY HIM AND THE VALUE THEREOF.

At this point we respectfully invite the attention of this Honorable Court to the Order in ancillary proceedings appointing Receivers, etc., and to that portion of said Order appearing in Vol. I of the Transcript of Record, page 32, which says:

> "That said Receivers are authorized to do all and any things and enter into all or any agreements as may be deemed by them necessary or advisable to preserve and protect the said property or assets; in their discretion to employ and discharge and to fix the compensation of such officers, agents and employees as may, in their judgment, be necessary or advisable in the administration of this estate; to employ accountants and counsel, and to make such payments and disbursements as may be needful or proper in the preservation of the assets of the defendant."

An order Continuing Receivers and Making Them Permanent with all powers and duties mentioned and set forth in the order of their appointment as temporary receivers appears in Vol. I, Transcript of Record, pages 36 to 39, inclusive, and in said last mentioned Order the employment by the Receivers of Philip A. Hershey & Co. as accountants, and of Edward R. Eliassen as attorney for the Receivers are confirmed and approved.

We deem it unnecessary to relate here in detail the services rendered by Mr. Hershey as accountant for the Receivers in this matter, inasmuch as his statement in detail of his said services is on file and in evidence and appears in Vol. II, Transcript of Record, at pages 785 to 798, inclusive, as Plaintiff's Exhibit No. 4. The Objecting Creditors do not deny the rendition of any of these services. This written statement of services was before the Special Master, who found the reasonable value thereof to be $10,000.00.

Mr. Willis Lilly, connected with the firm of McLaren, Goode and Co., certified public accountants, testified that the value of Mr. Hershey's services was $11,250.00, figured on a basis of 2624 hours, counting seven hours to a day. Mr. Andrew F. Sherman, a certified public accountant, called as an expert to testify to the value of Mr. Hershey's services, fixed such value at $15,000.00. Mr. Hershey, himself, testified to the value of his services and fixed the value of the same at from $4.00 to $10.00 per hour for approximately 2600 hours, which, taken at $4.00 an hour, would amount to $10,400.00. Mr. Lieurance testified

that he not only gave personal consideration to the value of Mr. Hershey's services, but likewise made inquiry of Mr. Willis Lilly, of the firm of McLaren, Goode and Co., before making final payment to Mr. Hershey.

No contrary evidence was offered by the Objecting Creditors as to the value of these services. There is no evidence in the record of this case showing either that the services alleged by Mr. Hershey and Mr. Lieurance to have been performed by Mr. Hershey were not performed, or that any thereof were unnecessary, or that said services, or any thereof, were inefficiently performed, or that the value of said services is less than $10,000.00.

It is contended by the Objecting Creditors that Mr. Hershey was employed at an agreed salary of $300.00 per month. The only evidence in the record to this effect is that of Mr. Ernst, whose deposition was taken in New York and who, among other things and in this respect, said, "At that time (meaning the time of the conference at Oakland, California, July 1, 1926), Mr. Lieurance told me that Mr. Hershey was receiving a salary of $300.00 per month."

We respectfully submit, however, that Mr. Hershey was not employed on a salary basis of $300.00 per month or any other fixed sum, and further that Mr. Lieurance did not tell Mr. Ernst that Mr. Hershey was receiving a salary of $300.00 per month or that he was employed on a salary basis.

Concerning this matter we quote from the testimony of Mr. Lieurance:

"At that first talk, nothing was said by either myself or Mr. Hershey about the amount of his compensation, because we knew nothing about the extent of the work that would be done, or the receivership; and it was some day or two after the first talk before there was anything said about a fee, and then the talk, in substance, was that we did not know what the value of the service or the amount of the work would be, and there was no value that [205] could be fixed on the services; and Mr. Hershey said he would have to have a drawing account because he had office expenses, and had his help to pay, and so on. * * * The amount that his drawing account should be was not discussed at that time. * * * No one knew what the extent of the work would be. * * *"

(Vol. I, Transcript of Record, page 245.)

"After that we did discuss the amount to be paid. That was probably three, or four, or five days, probably five days after we learned something about the receivership.

"The talk on that occasion was not definite; the amount was not definitely fixed then, but he would have to have a drawing account; there was no way to fix the amount. * * * He would do the work, and whatever was right and fair would be agreeable; that was substantially the talk at that time."

(Vol. I, Transcript of Record, page 246.)

"I let Mr. Hershey go ahead with his work, with no understanding between us as to what his compensation would be, until Mr. Walter Ernst came out from New York, and Mr. Ernst asked me how much I would have to pay Mr. Hershey, and I told him I did not know; and then I had a talk with Mr. Hershey about how much he would have to have on account, and he told me he would have to have from $250 to $300 a month, and that month we paid him $250 and he said that was not sufficient to take care of his bills, etc.,

and I paid him $300 a month, and also paid him $50 back pay for the first month.

"Mr. Ernst arrived here about June 30. The $250 paid to Mr. Hershey was not for the month of May. I don't remember when the payment was made but it was made some time afterwards. I could not tell you, without looking it up, whether it was after I had the talk with Mr. Ernst; it will show on the record. After I had this talk with Mr. Hershey, in which he said he would have to have $300 a month, Mr. Ernst asked me about it and I told him Mr. Hershey would have to have a drawing account of $300 a month. There was no further talk between myself and Mr. Ernst about it; he said that was fair enough or something to that effect and the subject was dropped then."

(Vol. I, Transcript of Record, page 247.)

In addition to the testimony and as physical evidence of the labor performed by Mr. Hershey in this receivership there were before the Special Master the records, documents, vouchers, books and accounts, and miscellaneous memoranda prepared and kept by him as the accountant for the Receivers. Thus the Special Master was able to obtain an intimate and complete knowledge of the services rendered by Mr. Hershey, as said accountant, and which the Special Master described in his report (Vol. I, Transcript of Record, page 197) as "laborious services efficiently performed." In fact counsel for the Objecting Creditors stated before the Special Master that the receivership was *very efficiently* conducted.

Mr. Gotthold, in his letter to Mr. Lieurance (Objecting Creditors Opening Brief, page 37) speaks of "the splendid work you have done in disposing of

the stores," and Mr. Walton N. Moore, in his letter of December 10th, 1926, to William N. Frazer (Objecting Creditors Opening Brief, page 18) says "*nearly all* of the *work* has been done *out here* where the property was located and the *results produced* by Lieurance have been *very creditable*."

The sum of $10,000.00 paid to Mr. Hershey was for services rendered to about April 30, 1927, the additional $750.00 was for services rendered between that date and the date of the hearing of Objections and Exceptions before the Special Master in October, 1927, and the sum of $19.18 was allowed to Mr. Hershey for moneys by him expended.

We respectfully contend that the aforesaid services of Mr. Hershey contributed to and helped to make possible the very creditable showing of Mr. Lieurance in the conduct of this receivership, and that Mr. Lieurance was fully justified in the employment of Mr. Hershey, as such accountant, and in the payments he made to Mr. Hershey for all of these services.

We therefore respectfully submit that the trial Court did not err in approving and confirming the report of the Special Master in relation to his findings as to the value of Mr. Hershey's services, nor did it err in ordering and directing the further payment of $769.18 to Mr. Hershey, which payment was recommended by the Special Master after hearing the evidence in relation thereto.

EMPLOYMENT OF EDWARD R. ELIASSEN, AS ATTORNEY FOR THE RECEIVERS, THE SERVICES RENDERED BY MR. ELIASSEN, AND THE VALUE THEREOF.

The record in this case shows that Mr. Walton N. Moore suggested to Mr. A. F. Lieurance that this Receivership be handled through the San Francisco Board of Trade, and that Mr. Lieurance employ the Attorneys of the San Francisco Board of Trade to act as the Attorneys for the Receivers in the western jurisdictions. This suggestion was taken under advisement by Mr. Lieurance, and thereafter by him refused, and he thereupon employed Mr. Edward R. Eliassen to act as the Attorney for the Receivers in the western jurisdictions. Mr. Eliassen immediately entered upon the performance of his services as such Attorney, and continued to serve as such throughout the Receivership.

A complete detailed written statement of the services rendered by Mr. Eliassen in this Receivership was filed and received in evidence before the Special Master, and appears in Vol. II, Transcript of Record, at pages 554 to 735 inclusive, and is designated "Receivers' Exhibit No. 3." As shown by this Statement of Services, Mr. Eliassen, as Attorney for the Receivers in the western jurisdictions, was required to be away from his office, and entirely out of the State of California, for approximately seventy-six (76) days. From the oral testimony of Mr. Eliassen before the Special Master, it is shown that there was hardly a day from the 4th day of June, 1926, to the 1st day of September, 1927, that he did not perform some professional service in connection with the business of the Receivership.

For detailed information as to the professional services rendered by Mr. Eliassen, we respectfully invite the attention of this Honorable Court to said "Receivers' Exhibit No. 3."

There is no denial in the record of the services rendered by Mr. Eliassen, as Attorney for the Receivers in this matter, but, in the Opening Brief for Objecting Creditors, they seek to minimize the value of the services so rendered by him, and even suggest that the legal assistance and guidance rendered by him to the Receivers could have been more efficiently performed by the Attorneys for the San Francisco Board of Trade. There is not a single word in the record in this case to show that the Attorneys for the San Francisco Board of Trade could have performed the legal work connected with this Receivership in any particular more efficiently, more conscientiously, more economically, or with greater dispatch than it was performed by Mr. Eliassen.

The Objecting Creditors, in their Opening Brief, page 57, in a further attempt to minimize the value of the services rendered in this Receivership by Mr. Eliassen, state:

> "It is undoubtedly true that Mr. Eliassen devoted a very substantial amount of his time to these receivership matters *during the first two months of his employment.*"

To this contention, no better answer suggests itself to us than to quote from the Report of the Special Master as the same appears in Transcript of Record, Vol. I, page 201:

> "The answer to this suggestion (the suggestion of Mr. Heney that a fee of $100.00 per day for a period of five months would amount to $15,000.00) is that a period of five months does not by any means represent the period of service, which continued until the filing of the final report in May, 1927, to take no account of the time occupied in preparing for this hearing. The stores were sold at the close of the five months' period, but after that the claims were determined and a great deal of necessary work done."

These findings by the Special Master are fully supported by Mr. Eliassen's above mentioned written Statement of Services, which sets forth in detail what services he performed subsequent to the selling of the stores, the last of which was sold on November 3, 1926, and these services so performed are set forth commencing on page 636, Vol. II, Transcript of Record, to and including page 735 of the same volume.

It is not true that this was Mr. Eliassen's first experience as Attorney for a Receiver, as stated in said Opening Brief. Mr. Eliassen had been practising law for approximately thirty years, and he testified in this case that he had acted as Attorney for Receivers in bankruptcy matters. However, there is no evidence in this record to the effect that the said services of Mr. Eliassen were not efficiently performed.

It is a matter of common knowledge that a Receiver in such a case as this requires the assistance and guidance of a competent lawyer, and, of necessity, constantly turns to him for aid. When the Attorney for the Objecting Creditors stated before the Special Master that the Receivership was very efficiently conducted, he, of course, fully realized that

this included the work of Mr. Eliassen; when Mr. Gotthold, in his letter to Mr. Lieurance, spoke of "the splendid work in disposing of the stores," he, too, being an Attorney, realized the importance of the services of the Attorney for the Receivers in connection therewith, and, when Mr. Walton N. Moore stated in his letter to Mr. Fraser that "the results produced by Mr. Lieurance had been very creditable," he, likewise, knew that the services of the Attorney for the Receivers contributed in no small degree to these "creditable results."

A letter, bearing date August 9, 1927, addressed To the Honorable, the Judge of the District Court of the United States, San Francisco, California, by Weber Showcase & Fixture Company, one of the largest creditors (its claim being in the neighborhood of $35,000.00), is set forth in Vol. I, Transcript of Record, at pages 419 and 420, and was offered in evidence by Plaintiffs, wherein they say:

> "It has come to our attention that Mr. A. F. Lieurance and his Attorney, Mr. Eliassen, have met with certain opposition in the matter of the settlement of the financial accounts of the Receivers in the Pilcher matter.
>
> "Our claim was probably one of the largest in this matter (being over $35,000) and we, therefore, know that this receivership possessed many complications and was very difficult to handle. These men have done a splendid piece of work, and we feel that their efforts should be recognized to the extent that nothing is done to hinder the winding up of this matter.
>
> "We want to go on record as not raising any objections to the fees being paid according to the Court's Order."

Another letter, bearing date July 27, 1927, addressed to Mr. William Fraser (who was Chairman of the New York Creditors' Committee), by A. V. Love Dry Goods Company, another one of the creditors in this matter, is set forth in Transcript of Record, Vol. I, pages 420, 421 and 422, wherein the writer, Mr. A. V. Love, who was a member of the New York Creditors' Committee, states, among other things:

> "I am strongly of the opinion that these men have done a splendid piece of work, as I have written you before.
> * * * * * * *
>
> "I want you to know that the A. V. Love Dry Goods Company, or the writer, has not been or is not a party to any objections that have been raised to these fees being paid according to the Court's order, and as you know we are one of the heaviest creditors.
> * * * * * * *
>
> "You must know that the assets of this company were on the Pacific Coast and that the work was actually done out here and that any compensation that should be rendered should be to those who did the work, and that was on the Pacific Coast by Mr. Lieurance and his attorney.
>
> "Therefore, I sincerely hope that you will use your influence to have this unfair opposition towards Mr. Lieurance and Mr. Eliassen withdrawn."

Still another letter, dated "Portland, Oregon, September 6, 1927," addressed to A. F. Lieurance, Receiver R. A. Pilcher Co., Central Bank Building, Oakland, California, by Journal Publishing Co., another of the creditors in this matter, is set forth in Vol. I, Transcript of Record, pages 422 and 423, wherein the following appears:

"Our attention has been called to the fact that a remonstrance has been filed against the allowance of the fees for the attorney and receiver in the above matter.

"The Journal, as a creditor of the estate, is well pleased with the manner in which its business has been handled and the dividend that we have received is unusually large under the circumstances.

"We take this opportunity to assure you that we have no objection to any fees for both the receiver and the attorney that the court has or may allow in this matter. We feel perfectly satisfied that the court will treat both the receiver and his attorney and the creditors justly and fairly."

Another letter, bearing date "Portland, Oregon, September 7, 1927," addressed to Mr. A. F. Lieurance, Receiver of R. A. Pilcher Co., Central Bank Building, Oakland, California, by Lowengart & Company, another one of the creditors in this matter, is set forth in Vol. I, Transcript of Record, pages 423 and 424, and which recites:

"We have just heard that certain creditors of the Pilcher Company have objected to fees that have been allowed by the Judges of the United States Court to you and your Attorney for services rendered.

"We, as creditors of the Pilcher Company, have been well satisfied with the work that you and your attorney have done. The results you have obtained have been satisfactory to us. We are perfectly willing and satisfied that the Court, which has knowledge of all of the work that has been performed, fix a fee that it thinks fair and reasonable for you and your attorney.

"There will be no objection on our part to this procedure which we think is fit and proper."

A number of the leading attorneys of the San Francisco Bar eminently qualified to testify regarding the value of the services rendered by Mr. Eliassen were called by the Plaintiff and gave their testimony before the Special Master.

Mr. Eliassen's written statement of his services had been submitted to them for examination, and, when asked upon the witness stand as to their opinion of the value of these services, they testified as follows: Mr. Charles H. Sooey testified that the reasonable value of the services of Mr. Eliassen is $42,620.00; Mr. C. M. Bradley testified that the reasonable value of Mr. Eliassen's services is from $25,000.00 to $30,000.00; and Mr. John L. McNab testified that the reasonable value of Mr. Eliassen's services is $36,000.00.

Other prominent attorneys were called by the Objecting Creditors to testify as to the value of the services of Mr. Eliassen, to-wit: Mr. William J. Hayes, who for a number of years occupied the position of Referee in Bankruptcy in the Federal Court, gave, as his opinion, that the value of the services rendered by Mr. Eliassen was $25,000.00; Mr. A. B. Kreft, who, at the time of giving his testimony, held the official position of Referee in Bankruptcy in San Francisco, gave as his opinion that from $20,000.00 to $25,000.00 would be fair and reasonable compensation for the services performed by Mr. Eliassen; Mr. Milton Newmark stated that in his opinion $20,000.00 would be a fair and reasonable compensation for the services performed by Mr. Eliassen in this matter.

Mr. Eliassen places the reasonable value of his services at $30,000.00.

Out of the fees allowed to Mr. Eliassen for his services in this matter, he has been required to pay for the services of attorneys employed to assist him in the northern jurisdictions the sum of $2,650.00, leaving for himself the sum of $27,350.00, out of which he has also voluntarily contributed his proportion of the $1,700.00 jointly contributed by him and Mr. Lieurance, and which was sent with other moneys to Mr. Lieurance's co-Receiver, Mr. Gotthold, in New York City. (Transcript of Record, Vol. I, page 233.)

We have examined the authorities cited in the Opening Brief for Objecting Creditors, and have noted the excerpts from these decisions as set forth in said Opening Brief. We respectfully submit that in none of these cases is there established any rule or formula that might be serviceable in any general way as a method of computing the amount to be allowed in the case at bar.

In passing, we beg leave to invite the attention of this Honorable Court to the quotation from the case of *Wilkinson v. Washington Trust Co.*, 102 Fed. 28, cited by Objecting Creditors at pages 59 and 60 of their Brief. Upon comparing this quotation with the original in said report, we find the same to be incorrect in this, that it omits language used by the Court indicating that the Reports of the Receivership there in question involved nothing more than a *simple narrative of his acts,* and an account of his Receipts

and Disbursements. (Italics ours.) This omission was, without doubt, unintentional.

Again comparing the quotation appearing on pages 51 and 52 of Opening Brief for Objecting Creditors, we find no portion of the original decision in any manner stressed by the use of capital letters or by italics. But, no doubt, the writer of the Opening Brief unintentionally omitted to state that these capitals and italics were his.

There is other language of the Court in this last named case however which we deem proper to call to the attention of this Honorable Court. It appears at page 31, Vol. 102, Federal, as follows:

> "We are of the opinion that the action of the circuit court in the premises was just and right, and, even if the issue were doubtful, we should not disturb or reverse its action unless the record disclosed a clear mistake of fact, or a plain error of law. A court of equity has the power to fix the compensation of the receiver it appoints. He is its creature,—one of the means by which it exercises its power. In the administration of a trust by a court through its receiver, the chancellor, who appoints, supervises and directs his action, necessarily knows, better than any record can teach an appellate court, what his appointee has done, and what is a just and reasonable compensation for his services. His allowances of this character ought to be, and are, largely discretionary with the chancellor, *and they should not be disturbed* unless there has been a *manifest disregard of right and reason.*" (Italics ours.)

It is respectfully submitted that after Mr. Eliassen was appointed by the Receivers as their Attorney in the western jurisdictions, his appointment as such

Attorney was approved by the Court appointing them in the western jurisdictions. As such Attorney, he assisted in the administration of the trust by all four Court in the western jurisdictions, and these Courts necessarily knew what he had done as Attorney for the Receivers, and what would be a just and reasonable compensation for these services; any amount, therefore, fixed and allowed by the trial Court as the reasonable value of such services, should not be disturbed unless there has been a manifest disregard of right and reason on the part of the trial Court in so doing.

In *Tardy's Smith on Receivers,* Vol. II, page 1723, it is stated:

> "In some instances, there is a statute to the effect that the compensation shall be such reasonable sum as the nature of the case justifies. It is evident that such a statute is not of much aid to a court, and is nothing more than a codification of what any court would say without reference to any statute. When thus left to their own resources in the matter, courts have found it impossible to establish any rule or formula that might be serviceable, in any general way, as a method of computing the amount to be allowed. The situation in that regard is revealed by the fact that courts have said, and no court seems to have denied, that the compensation must be fixed *in each case on its merits, as it arises.*" (Italics ours.)

In the case of *Heffron v. Rice,* 41 American State Reports, page 271, at page 277, the following appears:

> "The author (High, on Receivers), in Section 783, also lays down the doctrine that, as a general rule, the compensation should correspond with the degree of business capacity, integrity and

responsibility required in the management of the affairs entrusted to him, and that a reasonable and fair compensation should be allowed, according to the *circumstances of each particular case.*" (Italics ours.)

We take occasion to quote from the case of *Trustees v. Greenough,* 105 United States 536, cited in Opening Brief for Objecting Creditors, at page 52 thereof. We quote from page 537 of said Report as follows:

"The allowances made for these purposes (reasonable costs, counsel fees, charges and expenses) we have examined and do not find anything therein seriously objectionable. The Court below should have considerable latitude of discretion on the subject, since it has far better means of knowing what is just and reasonable than an appellate court can have." (Matter in parenthesis ours.)

We here quote from the case of *Hickey et al. v. Parrot Silver & Copper Co. et al.,* 79 Pac. 698, cited in Opening Brief for Objecting Creditors, at page 51 thereof. We quote from page 701 of said Report as follows:

"The receiver is entitled as a matter of right to the benefit of counsel, when the nature of the trust requires it; and, while he usually selects his own counsel, he cannot make any contract of hiring or agreement of compensation that is binding upon the court, for it is the function of the court to determine both the necessity for counsel, and compensation to be allowed therefor.

"The receiver is entitled to compensation for services performed by him, and the circumstances and environments of the *particular receivership* are proper to be considered in determining the amount of this compensation." (Italics ours.)

We quote further from this last named case, from page 702 thereof:

> "Evidence relative to the compensation of the receiver and the allowance for counsel fees may be admitted for the purpose of informing the Court as to what is just and reasonable under the circumstances; but, where the court has personal knowledge of all that has been done by the attorneys, it is not always necessary that it should hear evidence respecting the amount which it should allow, for a court is presumed to know the value of attorney's services, and it is for its own enlightenment that such evidence is heard."

In the case of *Stewart v. Boulware,* 133 U. S. 78, the following language is used, at page 79 of said report:

> "So far as the allowances to counsel are concerned, it is a mere question as to their reasonableness. Nor is there any doubt of the power of courts of equity to fix the compensation of their own receivers. That power results necessarily from the relation which the receiver sustains to the Court, and, in the absence of any legislation regulating the receiver's salary or compensation, the matter is left entirely to the determination of the court from which he derives his appointment.
>
> "The compensation is usually determined according to the *circumstances of the particular case,* and corresponds with the degree of responsibility and business ability required in the management of the affairs intrusted to him, and the perplexity and difficulty involved in the management. Like all questions of costs in courts of equity, allowances of this kind are largely discretionary, and the action of the court below is treated as presumptively correct, 'since it has far better means of knowing what is just and reasonable than an appellate court can have.'" (Italics ours.)

In the case of *Fidelity Trust Company v. Halsey & Smith, Ltd.,* 93 N. J. Eq. Rep. 161, at 162, among other things it said:

> "The fundamental rule is that the amount lies in the discretion of the court, having *regard to all the circumstances;* that the action of the court is *presumptively correct,* and will be *upheld if it does not plainly appear that there has been an abuse of discretion."* (Italics ours.)

When we consider the nature of the matters here administered, the amount involved, the complications attending them, the time spent by Mr. Eliassen in his office and away from his office in the State of California and away from his office outside of the State of California in connection with the work of this receivership performed by Mr. Eliassen, the skill required of him in the handling of the legal affairs of this receivership, the degree of success attained under all the circumstances, his fidelity to details, the responsibilities assumed by him as attorney for the Receivers, the character of these responsibilities, and the expedition with which he performed the services required of him in view of the results reached, all together with the testimony of the various attorneys who testified in relation to the reasonable value of these services; and when we further consider the favorable comments made by some of the largest creditors in this matter upon the services performed by Mr. Eliassen as attorney for the Receivers, as said comments are set forth in some of the letters above referred to, and the refusal of said creditors to object to the fees of Mr. Eliassen; and when we further consider the fact that Mr. Eliassen was called upon to

pay from his fees the sum of $2,650.00 (Transcript of Record, Vol. I, page 305) for the services of other Attorneys whom he employed to assist him in the northern jurisdictions; and when we further consider the allowance of $15,000.00 to Messrs. McManus. Ernst & Ernst, Attorneys for the Receivers in the Eastern jurisdictions where but a comparatively small part of the work of the Receivers was performed, we respectfully submit that the sum of $30,000.00 as a fee for his services is not only not excessive but indeed a modest charge.

This fee of $30,000.00, of course, does not take into consideration the extra and laborious work he has been called upon to perform growing out of the Objections and Exceptions filed herein by the Objecting Creditors.

All of these matters were before the Special Master when, in his report, he found the reasonable value of the services of Mr. Eliassen to be $30,000.00, and were likewise before the trial Court when it rendered its Judgment and Decree overruling the Objections and Exceptions to the Report of the Special Master and approving and confirming said Report and fixing and allowing a fee of $30,000.00 to Mr. Eliassen.

It is, therefore, further respectfully submitted that the trial Court did not err in overruling the Objections and Exceptions to the Report and Findings of the Special Master, dated January 19, 1928, relating to the fees of Mr. Eliassen; nor did the trial Court err in approving, ratifying and confirming the Report and Findings of the Special Master, dated January

19, 1928, relating to the fees of Mr. Eliassen; nor did the trial Court err in approving, ratifying and confirming the Final Accounts and Reports of the Receivers; nor did the trial Court err in allowing and fixing the sum of $30,000.00 as compensation to be paid to Mr. Eliassen as Attorney for the Receivers.

It is further respectfully submitted that the fixing of the sum of $30,000.00 as the full reasonable value of the services of Mr. Eliassen, and the Order and Decree of the trial Court allowing said sum for his said services, and directing the payment thereof to him, find ample support in the evidence and the record of this case.

It is respectfully submitted that nowhere in the Objections and Exceptions filed by the Objecting Creditors to the Master's Report is there called in question any ruling of his in admitting or rejecting evidence.

In the case of *Last Chance Mining Co. v. Bunker Hill & S. Mining & C. Co.*, 131 Fed. 579, at 587, (1904), the Court said:

> "Certain exceptions were filed by the defendants to the master's report, but none calling in question any ruling of his in admitting or rejecting evidence. Findings of fact made without any evidence to support them may, and should, as a matter of course and of law, be disregarded; *but findings made by a master in pursuance of an order to take the proofs and report the facts and conclusions of law to the court, that depend upon conflicting testimony, or upon the credibility of witnesses,* ESPECIALLY *where, as in the present case, they are approved by the trial court, will not be disturbed.*" (Italics ours.)

Citing cases:

Davis v. Schwartz, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289;

Warren v. Keep, 155 U. S. 265, 15 Sup. Ct. 83, 39 L. Ed. 144;

Crawford v. Neal, 144 U. S. 585, 12 Sup. Ct. 759, 36 L. Ed. 552;

The Iroquois, 194 U. S. 240, 24 Sup. Ct. 640, 48 L. Ed. 955 (May 2, 1904);

The S. B. Wheeler, 20 Wall. 385, 22 L. Ed. 385;

The Lady Pike, 21 Wall. 1, 8, 24 L. Ed. 672;

The Richmond, 103 U. S. 540, 3 L. Ed. 670;

Towson v. Moore, 173 U. S. 17, 19 Sup. Ct. 332, 43 L. Ed. 597;

Smith v. Burnett, 173 U. S. 430, 436, 19 Sup. Ct. 442, 43 L. Ed. 756;

Singleton v. Felton, 101 Fed. 526, 42 C. C. A. 57;

The Columbian, 100 Fed. 991, 41 C. C. A. 150;

North American Exploration Co. v. Adams, 104 Fed. 404, 45 C. C. C. 185;

Fidelity & Casualty Co. v. St. Mathews Sav. Bank, 104 Fed. 858, 44 C. C. A. 225;

Western Union Tel. Co. v. American Bell Tel. Co. (C. C.) 105 Fed. 684;

National Hollow B. B. Co. v. Interchangeable B. B. Co., 106 Fed. 693, 45 C. C. A. 544;

Chauncey v. Dyke Bros., 119 Fed. 1, 55 C. C. A. 579;

Thallman v. Thomas, 111 Fed. 277, 49 C. C. A. 317.

The Court further states:

> "The appellants do not, and, in view of the record, could not, contend that there is no evidence to support the findings."

It is respectfully submitted that in the instant case the situation is the same, that is to say: the appellants do not, and, in view of the record herein, could not, contend that there is no evidence to support the findings of the Master.

In the case of *Midland Bridge Co. v. Houston & B. V. Ry. Co.,* 268 Fed. 931, at page 937, (1920), the Court states:

> "[4] Where the master and trial court agree on the findings of fact, they are conclusive on the appellate court, where there is any substantial evidence to support them."

Citing with approval the *Last Chance Mining Co.* case, *supra,* and also the following cases:

Mercantile Trust Co. v. Chicago, P. & St. L. Ry. Co., 147 Fed. 699, 78 C. C. A. 87;

Moffatt v. Blake, 145 Fed. 40, 75 C. C. A. 265.

In the case of *Farmers' Loan & Trust Co. v. M'Clure,* 78 Fed. 209, at page 210, the Court said:

> "It is the settled rule of the federal courts that where the court below has considered conflicting evidence, and made its finding and decree thereon, they must be taken as presumptively correct; and, unless an obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand. Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. 894; Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355; Furrer v. Ferris, 145 U. S.

132, 134, 12 Sup. Ct. 821; Warren v. Burt, 12 U. S. App. 591, 7 C. C. A. 105, and 58 Fed. 101; Plow Co. v. Carson, 36 U. S. App. 456; 18 C. C. A. 606, and 72 Fed. 387. *In view of this principle, and in consideration of the great weight which ought to be given to the opinion of the trial court as to the value of the services of solicitors in cases pending before it, we are unwilling to disturb the decree in this case. Let it be affirmed, with costs.*" (Italics ours.)

APPOINTMENT OF MR. A. F. LIEURANCE, AS CO-RECEIVER WITH ARTHUR F. GOTTHOLD, OF NEW YORK, THE SERVICES RENDERED BY MR. LIEURANCE IN CONNECTION WITH THIS RECEIVERSHIP, AND THE VALUE OF SAID SERVICES.

As the records of this case disclose, Mr. Lieurance was selected by the Creditors' Committee in the eastern jurisdiction in this matter, and appointed as co-Receiver with Mr. Gotthold without any previous knowledge on the part of Mr. Lieurance that his name was even being considered by said Committee for such appointment, or that any such appointment of himself as Receiver would be made, or even that the R. A. Pilcher Co. was in financial difficulties.

There can be no doubt but that the said selection and appointment of Mr. Lieurance to act as co-Receiver in this matter was due to the following facts:

1.—The R. A. Pilcher Co. was engaged in the chain store merchandising business.

2.—Practically all of the business of the R. A. Pilcher Co. was to be done in the western jurisdictions, as all of the stores belonging to the company, sixteen in number, were located in the jurisdictions

of California, Oregon and Washington, and Mr. Lieurance resided in Oakland, California.

3.—From the very nature of this business, it was apparent to the Creditors' Committee that the best interests of the creditors required that a man be selected and appointed as Receiver who was thoroughly qualified and acquainted with this type of merchandising.

4.—The Creditors' Committee knew or had heard of Mr. Lieurance's long and successful experience in the chain store merchandising business, and realized that, by placing Mr. Lieurance in the position of Receiver in this matter, the affairs of the Receivership would be conducted in a careful, conscientious, efficient and businesslike manner.

The Creditors' Committee in the eastern jurisdiction could readily have selected the Board of Trade of San Francisco, or some one else, other than Mr. Lieurance, to conduct the business of the Receivership in the west, had it so desired.

The fact that the Board of Trade of San Francisco was not so selected, and that Mr. Lieurance was, is the best evidence that the Creditors' Committee in the eastern jurisdiction was satisfied that better results could be obtained for the creditors through the employment of Mr. Lieurance than by having the San Francisco Board of Trade, or any one else, take charge.

The record further shows that Mr. Lieurance, upon accepting the employment, proceeded without delay to thoroughly acquaint himself with the entire situation,

and, in the exercise of his judgment, and as was his right, he selected and employed, as Attorney for the Receivers in the western jurisdictions, a competent and reliable Attorney of his own acquaintance, Mr. Edward R. Eliassen, rather than the Attorney for the San Francisco Board of Trade, as suggested by Mr. Walton N. Moore, who was a member thereof, and likewise one of the creditors of the R. A. Pilcher Company, and a member of the Creditors' Committee in the western jurisdictions; he also employed Philip A. Hershey & Company, whom he knew to be capable and reliable accountants, set up his office for general control, and immediately got into touch with every detail necessary to the intelligent and efficient performance of the duties of his trust.

He filed herein a statement of his services, and the same has been supplemented by his oral testimony, and that of his Attorney, Mr. Eliassen, and the accountant, Mr. Hershey. In his testimony given before the Special Master in this matter, Mr. Lieurance relates the nature and extent of his experience in the chain store merchandising business, from which we submit that it is readily apparent that he was peculiarly well qualified to serve as Receiver herein.

The foregoing statement of services of Mr. Lieurance was offered and received in evidence at the hearing before the Special Master, and is set forth in Vol. II, Transcript of Record, at pages 735 to 798, inclusive, to which statement we respectfully invite the attention of this Honorable Court. Immediately following said statement on pages 798 and 799, Vol. II of the Transcript of Record, are certain Exhibits,

to-wit: Plaintiff's Exhibits 3, 4, 5, 6 and 7, Receivers' Exhibit 9, Plaintiff's Exhibit 10, and Receivers' Exhibit 11, the originals of all of which Exhibits are to be transmitted to the Appellate Court for use upon this appeal upon the Order of the Judge of the Court and pursuant to stipulation of the parties.

We likewise respectfully call the attention of this Honorable Court to these Exhibits, particularly Receivers' Exhibit 9, consisting of communications addressed by Receiver Lieurance to the several store managers and to Plaintiff's Exhibit 10, consisting of certain data assembled by Receiver Lieurance and sent by him to prospective purchasers of the several stores. These communications to the store managers and to prospective purchasers indicate the type of close, constant and personal attention which Mr. Lieurance gave to this Receivership.

The whole record in this case discloses beyond all question that, from the very moment of his acceptance of this trust, Mr. Lieurance realized the great responsibilities he was assuming, and determined to give, and did give, to this matter the benefit of his long experience as a successful business man, particularly his experience in the chain store line of merchandising, and earnestly and honestly put forth his every effort to the end that every dollar possible should be saved from this financial wreck for the benefit of the 687 creditors scattered throughout the United States, and to the end that whatever dividends were to be allowed them should be paid as soon as possible, and the Receivership brought to a close at the earliest possible date.

The preferred claims amounting to $5,816.34 were paid. Dividend No. One, paid December 24, 1926, was forty per cent of the general claims, and amounted to $287,517.67; Dividend No. Two, paid May 13, 1927, was ten per cent of the general claims, and amounted to $71,879.39.

A dividend of fifty per cent was paid on Simplex Shoe Manufacturing Company's adjusted claim as allowed by the Master, amounting to $437.51, making a total paid on claims of $365,650.91. Cash in the sum of $25,000.00 was sent by Mr. Lieurance to Mr. Gotthold, his co-Receiver, in the eastern jurisdiction.

CRITICISMS OF OBJECTING CREDITORS.

Counsel for the Objecting Creditors argue, in effect:

First:—That this Receivership was a very simple procedure, and required on the part of the Receiver no more than ordinary experience and ability in the merchandising business;

Second:—That, in the conduct of this Receivership, Mr. Lieurance displayed very poor business judgment;

Third:—That he should have done his own accounting;

Fourth:—That he was responsible for the amounts allowed in the eastern jurisdiction: (a) To Mr. Gotthold, as co-Receiver in this matter, the sum of $7,500.00; (b) To Messrs. McManus, Ernst & Ernst, as Attorneys for the Receivers in the eastern jurisdiction, the sum of $15,000.00; and (c) To the account-

ing firm of Leidesdorf & Co., as Accountants for the Receivers in the eastern jurisdiction, the sum of $7,700.00;

Fifth:—That Mr. Lieurance's large experience in this line of business contributed nothing to the success of this Receivership;

Sixth:—That, had Mr. Lieurance followed the suggestion of Mr. Walton N. Moore, and had handled this Receivership through the San Francisco Board of Trade, and with the aid of its Attorneys, the Receivership would have been handled much more efficiently and with better results, and that the services performed by Mr. Eliassen, as the Attorney for the Receivers in the western jurisdictions, could have been performed in one-fourth or one-half of the time devoted to these services by Mr. Eliassen.

In addition to the foregoing, the Objecting Creditors have sought to impugn the integrity and good faith, both of Receiver Lieurance and Mr. Eliassen, his Attorney.

As to the nature and extent of this Receivership, it is respectfully submitted that the chain store merchandising business is a type of business which has developed only within the last few years, and that there are but few men who, from experience, are capable of understanding its various ramifications. The work which Mr. Lieurance was called upon to perform in connection with this Receivership, we shall not take the time or space to repeat in this argument, but respectfully refer this Honorable Court to his Statement of Services above mentioned. This

Statement not only discloses the nature and extent of the work to be done, but likewise the close and constant attention given to it in all its detail by Mr. Lieurance.

It will be remembered that practically all of the work required of the Receivers in this matter was performed by Mr. Lieurance; also, that there were sixteen stores,—three in California, six in Oregon, and seven in Washington, and the Receivership was conducted in four separate jurisdictions; that there were nearly seven hundred creditors, and they were scattered throughout the United States; that the Receivership was so to be conducted that a full and complete report as to the condition of each one of these stores could be disclosed to these creditors upon call from any one of them, and that complete reports of the Receivership could be made to any one of the four Courts in the western jurisdictions promptly and accurately.

It is ridiculous to contend that any Receiver should be expected to do accounting work of this nature himself. The final account alone in this matter, as presented to the trial Court, contains some six hundred pages of items, to say nothing of the vast amount of other work required in the matter of keeping the books and records relating to this Receivership.

It is even more ridiculous to contend that, in addition to the work required of Mr. Lieurance in conducting the business of this Receivership, he should assume, or that any Receiver should assume, under like circumstances, to do the accounting work himself, or to rely upon an ordinary bookkeeper for its per-

formance. Realizing, as he did, the type of accounting work that would be required, he employed Mr. Philip A. Hershey, and we respectfully submit that the accounting records in this case fully justify such employment and the payments made to Mr. Hershey therefor.

So far as the allowances in the eastern jurisdictions are concerned, the matter of the services performed by Mr. Gotthold, Messrs. McManus, Ernst & Ernst, and by Leidesdorf & Co., those were matters that rested entirely with the Court of original jurisdiction, and were, no doubt, granted upon the showing made by these gentlemen as to the character and extent of the work they performed.

It is respectfully submitted that the contention made by the Objecting Creditors in their Opening Brief that Mr. Lieurance's large experience in this line of business contributed nothing to the successful handling of this Receivership, is positively stupid.

Concerning the San Francisco Board of Trade, and its Attorneys, it is respectfully submitted that there is nothing in this record to support the suggestion that had the Receivership been handled through the San Francisco Board of Trade, or by its Attorneys, it would have been any more efficiently or successfully handled than it has been by Mr. Lieurance, as co-Receiver, and Mr. Eliassen, as the Attorney for the Receivers in the western jurisdictions.

It appears from the record in this case that Mr. Walton N. Moore, one of the creditors of R. A. Pilcher Co., and a member of the San Francisco

Board of Trade, and Mr. Kirk, the Attorney for the San Francisco Board of Trade, were incensed because Mr. Lieurance refused to accept these suggestions from Mr. Moore, and have vented their feelings and disappointment in this regard by attacking both the good faith and the integrity of Mr. Lieurance and Mr. Eliassen. Practically one-third of the Opening Brief for the Objecting Creditors is given over to these attacks in the form of letter and telegraphic correspondence, concerning which the Special Master, in his report (Transcript of Record, Vol. I, pages 178, 179 and 180) says:

> "While as above stated, there are only three questions to be decided, the greater portion of the voluminous objections [151] which have been filed have to do with charges by the objecting creditors that Mr. Lieurance and his attorney, in obtaining orders from the various ancillary jurisdictions on December 10, 1926, and the succeeding days, fixing Receivers' and attorneys' fees *ex parte,* were guilty of violation of an existing agreement with Mr. Moore and Mr. Kirk, with duplicity toward these gentlemen and Mr. Gotthold, and with imposition and misrepresentation toward the courts that passed the orders complained of. The Master stated at the outset of the hearing (Tr., p. 2) that after reading the objections and the answer thereto he did not think these questions material in view of the fact that the orders complained of had been subsequently opened for review. Nevertheless, the subject matter was opened by Mr. Heney on the cross-examination of Mr. Eliassen. The Master's expressed opinion was referred to by Mr. Crosby, though not in the form of an objection, but Mr. Heney pressed it as cross-examination having a bearing on the weight of the testimony of Mr. Eliassen and Mr. Lieurance regarding the value of their services,—a position amplified in the opening brief, p. 15, by the addi-

> tional contention that if the charges are true the Receiver and his attorneys are not entitled to compensation for services in opposing the objections and in securing additional compensation, and also as substantiating a request by counsel for the objectors for an allowance of costs and expenses incurred by the objecting creditors. The great bulk of the testimony in this record and of the presentation in the briefs concerns this question of whether the charges of bad faith are true. I allowed the testimony at the hearing, and I shall pass upon it here, not because I believe my first impression of the materiality of the evidence was incorrect but because charges of so serious a nature against men honored by appointment as officers of the court should not be passed by, whether material to the main issue or not. [152]"

In the light of these criticisms launched by the Objecting Creditors, and their Counsel, in their Opening Brief, against the conduct of this Receivership by Mr. Lieurance, we deem it proper here to repeat the expressions:

First:—By Mr. Francis J. Heney, one of counsel for the Objecting Creditors, and who is one of the writers of the Opening Brief for Objecting Creditors herein, wherein he stated before the Special Master that the work of the Receivership has been "efficiently conducted," a statement which we submit is entirely at variance with the comments he has written in the Opening Brief upon this subject;

Second:—By Mr. Walton N. Moore, of the Walton N. Moore Dry Goods Company, one of the largest creditors of the R. A. Pilcher Company, a member of the San Francisco Board of Trade, a member of

the Creditors' Committee in the western jurisdictions, and who we believe is the leader of the Objecting Creditors herein, to-wit: "The results produced by Mr. Lieurance have been very creditable.";

Third:—By Mr. Arthur F. Gotthold, co-Receiver in the New York jurisdiction, who, in writing to Mr. Lieurance, referred to the sale of the stores made by Mr. Lieurance as, "Your splendid work in disposing of the stores."

These expressions of commendation by Mr. Heney and Mr. Walton N. Moore are absolutely inconsistent with the criticisms voiced by these gentlemen in their Opening Brief in this matter. Mr. Gotthold fully appreciated the nature and extent of the work performed by Mr. Lieurance in so successfully disposing of these stores, as the record shows that he has acted as a Receiver upon numerous occasions, and, when he described Mr. Lieurance's services as "splendid," he spoke with knowledge of what those services meant.

In addition to the foregoing favorable comments by these Objecting Creditors and their Counsel upon the work of Mr. Lieurance, we deem it proper to quote the expressions of other creditors of the R. A. Pilcher Company, wherein, without reserve, they praise the services rendered both by Mr. Lieurance and his Attorney, Mr. Eliassen, to-wit:

First:—Mr. A. V. Love, of the A. V. Love Dry Goods Company, and who himself was a member of the New York Creditors' Committee, in writing to Mr. Frazer, the Chairman of the New York Creditors' Committee, said:

"I am strongly of the opinion that these men (Mr. Lieurance and Mr. Eliassen) have done a splendid piece of work, as I have written you before.

* * * * * * *

"I want you to know that the A. V. Love Dry Goods Company, or the writer, has not been or is not a party to any objections that have been raised to these fees being paid according to the Court's order, and as you know we are one of the heaviest creditors.

* * * * * * *

"You must know that the assets of this company were on the Pacific Coast and that the work was actually done out here and that any compensation that should be rendered should be to those who did the work, and that was on the Pacific Coast by Mr. Lieurance and his attorney.

"Therefore, I sincerely hope that you will use your influence to have this unfair opposition towards Mr. Lieurance and Mr. Eliassen withdrawn." (Italics and parenthesis ours.)

Second:—The Journal Publishing Company, in its letter addressed to Mr. Lieurance, and which is in evidence in this case, said:

"The Journal, as a creditor of the estate, is well pleased with the manner in which its business has been handled and the dividend that we have received is unusually large under the circumstances." (Italics ours.)

Third:—Lowengart & Company, of Portland, Oregon, in their letter addressed to Mr. A. F. Lieurance, and which letter is in evidence in this case, said:

"We, as creditors of the Pilcher Company, have been well satisfied with the work that you and your attorney have done. The results you have obtained have been satisfactory to us." (Italics ours.)

Fourth:—The Weber Showcase & Fixture Company, of Los Angeles, California, in its letter To the Honorable, the Judge of the District Court of the United States, San Francisco, California, and which said letter is in evidence in this case, said:

> *"Our claim was probably one of the largest in this matter (being over $35,000) and we, therefore, know that this receivership possessed many complications and was very difficult to handle. These men have done a splendid piece of work, and we feel that their efforts should be recognized to the extent that nothing is done to hinder the winding up of this matter."* (Italics ours.)

Summing up these opinions as to the manner in which this Receivership was handled, the results produced, and the type of services rendered by both Mr. Lieurance and Mr. Eliassen:

The work of the Receivership was efficiently conducted;

The results produced by Mr. Lieurance have been very creditable;

He did splendid work in disposing of the stores;

These men have done a splendid piece of work;

The work was actually done out here on the Pacific Coast;

This work was done by Mr. Lieurance and his Attorney;

The compensation should go to those who performed the work;

The opposition towards Mr. Lieurance and Mr. Eliassen is unfair and should be withdrawn;

As a result of the manner in which the business has been handled, the dividend that the creditors received is unusually large under the circumstances;

The results obtained by Mr. Lieurance and his attorney have been satisfactory;

The Receivership possessed many complications, and was very difficult to handle.

The Objecting Creditors and their Attorneys, knowing of these favorable comments concerning the services of Mr. Lieurance in this Receivership on the part of the A. V. Love Dry Goods Company, seek to offset their effect by suggesting that Mr. Lieurance, as Receiver, while the stores were kept running by him, purchased large quantities of goods from the A. V. Love Dry Goods Company, and that thereby the A. V. Love Dry Goods Company made a reasonable profit, and for that reason they commended the work of Mr. Lieurance.

Mr. Lieurance, however, also bought goods during the Receivership from the Walton N. Moore Dry Goods Company, in San Francisco, and that company likewise, no doubt, made a reasonable profit thereon. It is true that he did not buy as large quantities of goods from the Walton N. Moore Dry Goods Company as from the A. V. Love Dry Goods Company, but, in this regard, it will be observed that but three of the stores in this Receivership were located in California, —one at Stockton, one at Oroville, and one at Turlock,—while seven of the stores were located in Washington, and six in Oregon. As a business proposition,

it was necessary for the Receiver, in making purchases, to consider the question of the expense of transportation.

There is nothing in the record in this case, however, to show that Mr. Lieurance, as such Receiver, transacted any substantial amount of business with the Journal Publishing Company, from which it may have made a profit, although some advertisement may have been carried in that paper, by Mr. Lieurance. There is nothing in the record to show that Mr. Lieurance purchased any goods from Lowengart & Company, of Portland, Oregon, or from Mr. Gotthold, or from the Weber Showcase & Fixture Company. Indeed, the original claim of the last mentioned company, amounting to $33,743.21, was allowed for but the sum of $16,871.60.

Surely Mr. Lieurance purchased no goods from the Attorney for the Objecting Creditors.

We submit that there is no merit in the suggestion that any of these companies or individuals were inspired or induced to extol the *labors* of Mr. Lieurance or Mr. Eliassen by any special favors done them by either of these two gentlemen.

Again, in an effort to show that there was some especially friendly relationship existing between Mr. Lieurance and Mr. A. V. Love, which prompted Mr. Love to so express himself, the Objecting Creditors, on page 50 of their Opening Brief, say:

> "By way of illustration, the Penney Company have been selling large amounts of merchandise to A. V. Love & Company at Seattle, Washing-

ton (one of the largest creditors of Pilcher & Co., Inc.) Mr. Lieurance so testified.

"Did the receivership for Pilcher & Co., Inc., as conducted by Mr. Lieurance, do likewise and and make *large sales* of goods at a profit to A. V. Love & Company? No, *on the contrary,* the receivership purchased substantially large quantities of goods from Love & Company and it is fair to infer that Love & Company made a reasonable profit upon the thing."

It will be remembered that Mr. Lieurance at one time was connected with and was a stockholder in the Penney Company, but it is submitted that the writers of the Opening Brief have, in this matter, assumed something that is not supported by the record in this case, that is, that "the Penney Company have been selling large amounts of merchandise to A. V. Love & Company at Seattle." There is no word of testimony herein that the Penney Company have been selling large, or any, amounts of merchandise to A. V. Love & Company. Mr. Lieurance did not testify that such sales were made. His testimony on this subject appears in Vol. I, Transcript of Record, at page 434, wherein he said:

"I have known Mr. Love for about ten years. I have had numerous transactions with him, for the Penney Company. The aggregate volumes of those transactions was very large. * * * It was profitable for me. I do not know whether it was profitable for Mr. Love, or not. Evidently it was, or else he would not have carried it on."

The fact is that the Penney Company was engaged in the retail business—selling to consumers, as was the

R. A. Pilcher Co., Inc., and not in the wholesale business—selling to other merchandising concerns.

It is respectfully submitted that Mr. Lieurance was perfectly justified in sending Mr. Hershey to New York, which was done with the approval of the Court. The uncontradicted evidence in this case shows that Mr. Lieurance had been endeavoring constantly for months, but without success, to procure, from those in charge of this Receivership in the eastern jurisdiction, information which was necessary to round out his accounts and reports of the Receivership in the western jurisdictions. In answer to his requests for this information, he was advised from time to time that this information was not yet ready.

The fact is, as is shown by the evidence in this case, and which was without contradiction, that when Mr. Hershey reached New York he found that *comparatively nothing had been done toward an auditing of the books and accounts of the company,* and he found it necessary to work with the accountants there for approximately two weeks, working day and night, to compile accurate and authentic statements of the various accounts as shown by the books of the company. Mr. Hershey, upon this trip to New York, further discovered that the aggregate claims against this estate approximated $740,000.00, instead of $600,000.00 as had theretofore been reported to Mr. Lieurance in the western jurisdictions.

It is further respectfully submitted that it is quite apparent that had Mr. Hershey not gone to New York it would have been impossible for Mr. Lieurance to acquire or obtain this important information.

MR. ELIASSEN'S TRIP TO NEW YORK.

In the Opening Brief for Objecting Creditors, at page 48 thereof, they say:

> "This opposition by the creditors committee made it necessary to take the depositions of Walter Ernst and Arthur F. Gotthold in New York City. Receiver Lieurance unhesitatingly incurred the expense of sending his attorney, Edward R. Eliassen, to New York City to attend the taking of these depositions."

In this regard, it is submitted that the first intimation received by Mr. Lieurance that any depositions were to be taken in New York was a reference thereto in the Objections and Exceptions to Final Account and Report of Receivers, etc., filed herein on or about July 21, 1927, wherein, in paragraph 3 thereof, under the heading: "Hearing Upon These Objections and Exceptions, Etc.", they say:

> "(a) To present the evidence in support of these Objections and Exceptions, it will be necessary to take *oral testimony,* both in California and *in New York City,* and possibly in Oregon and Washington." (Italics ours.)

It was thereafter, and on or about August 3, 1927 (Transcript of Record, Vol. II, page 731) that Notices and Affidavits for taking the Depositions of Arthur F. Gotthold, William Frazer, and Walter E. Ernst came to the attention of Mr. Eliassen, and said Depositions were noticed to be taken in New York on *August 16, 1927,* at 10:00 o'clock A. M. This testimony was to be taken on oral interrogatories.

We respectfully submit that the time to elapse between the date of the Notices of the Taking of these

Depositions, and the date upon which the Depositions were to be taken in New York, was so short, and the scope and extent of these Depositions was so indefinite, that it was absolutely impossible for Mr. Lieurance and Mr. Eliassen to properly inform any local counsel in New York in such a way as to enable such local counsel to intelligently cross-examine the witnesses whose Depositions were to be taken.

As above stated, the Objecting Creditors declared that the testimony thus to be taken in New York was to be in support of the Objections and Exceptions of the Objecting Creditors. These Objections and Exceptions were directed against the conduct of the Receivership in the western jurisdictions by Mr. Lieurance, and the actions of Mr. Lieurance, and Mr. Eliassen, the Attorney for the Receivers, in connection therewith. We, therefore, submit that it was not only necessary and proper, but also fair and just, that Mr. Eliassen go personally to New York to be present at the taking of these Depositions.

The Objecting Creditors contend that Mr. Lieurance was extravagant in his handling of this Receivership. To this charge we answer that a dividend of fifty per cent (50%) to the creditors herein is most convincing evidence that Mr. Lieurance was neither extravagant nor careless in his management.

The Objecting Creditors, at page 74 of their Opening Brief, state:

> *"At the hearing before the Master, it developed that Receiver Lieurance had subsequently paid Mr. Hershey Two Thousand ($2,000.00) Dollars additional, and this fact was unknown to the*

Creditors or their attorneys until it came out at the hearing.'' (Italics ours.)

This is but another attempt on the part of the Objecting Creditors and their counsel to discredit Mr. Lieurance.

The Final Account in this matter was filed on May 19, 1927. (Transcript of Record, Vol. I, page 240.) The Objections and Exceptions to this Account were filed subsequent thereto, to-wit:—June 27, 1927. (Transcript of Record, Vol. I, page 125.)

The item of $5,900.00 paid to Mr. Hershey appears on page 599 of this Final Account upon line 14 thereof. The item of $2,000.00 paid to Mr. Hershey appears *in the same Final Account, at page 54 thereof, line 13.*

The Objecting Creditors, and/or their counsel, surely examined this Final Account before they filed their Objections and Exceptions thereto. The item of $2,000.00 paid to Mr. Hershey was as readily discernible as was the item of $5,900.00 paid to him as shown by this Final Account. It is, therefore, respectfully submitted that there is no justification whatever for the suggestion set forth in the Opening Brief for Objecting Creditors that Mr. Lieurance, or any one else, had concealed, or had attempted in any way to conceal, from the Objecting Creditors, or their counsel, the above mentioned payment of $2,000.00 to Mr. Hershey.

We have heretofore set forth in this Brief the Order and Decree of Honorable Augustus N. Hand, approving and confirming the Final Account and Report of the Receivers in this matter in the New

York jurisdiction, and discharging the Receivers, and canceling and discharging their bond; also, the telegram from Mr. Arthur F. Gotthold, co-Receiver in New York, showing all claims heard before Judge Cardozo disposed of, and further showing that the moneys directed to be paid by said Order of Judge Hand of December 10, 1928, to have been paid, and that that Order finally discharged equity Receivers upon making these payments. This disposed of the matter of the disputed claims of $10,000.00 referred to on page 46 of the Opening Brief of the Objecting Creditors.

Inasmuch as the Objecting Creditors have requested this Honorable Court to reduce the allowances to Mr. Lieurance and to Mr. Eliassen, urging, as one of their grounds therefor, that moneys should be reserved to pay these disputed claims, we deem it proper, and in the interest of justice, that this Honorable Court be advised of this action of Judge Hand in making the above mentioned Order and Decree.

ATTACKS OF OBJECTING CREDITORS UPON THE HONESTY, INTEGRITY AND GOOD FAITH OF MR. LIEURANCE AND MR. ELIASSEN.

An examination of the Objections and Exceptions filed herein, and of Exhibit "A" attached thereto and made a part thereof shows these gentlemen to be charged therein with violating an arrangement and agreement; with making representations which were misleading and deceptive; with concealing material

matters from the Court and with intentionally misleading the Court.

These or like charges and insinuations against Mr. Eliassen and Mr. Lieurance have been carried into the Opening Brief of the Objecting Creditors herein. They ask this Honorable Court to believe that these two gentlemen imposed upon, misled and induced four different United States District Judges to award them exorbitant fees.

It is submitted that Mr. Lieurance came into this position of Receiver, after a long, successful and honorable business career, and the manner of his selection and appointment, all without any knowledge on his part, stands as convincing evidence that his reputation for honesty, integrity and good faith is of the best. From the letter of Mr. Frazer to Mr. Moore, shown on page 30 of the Opening Brief herein, we quote the following in relation to the reputation of Mr. Lieurance:

> "Ernst told me over the telephone yesterday that he had received a wire from Lieurance stating that as far as he was concerned he did not intend to ask for any definite amount of compensation, but intended to leave it absolutely to the fairness of the Judge. I do not feel that I wish to criticise Mr. Lieurance's attitude because *I have a very high regard for his ability and other qualifications about which I have been so favorably informed.*" (Italics ours.)

Mr. Eliassen, after approximately thirty years' active practice in the legal profession in the various Courts of the State of California, likewise entered

upon the discharge of his duties in this Receivership without a single blemish upon his reputation.

It seems, however, at the close of their labors, which the record in this case shows beyond all question were ably and conscientiously performed, and when the Court was called upon to determine what compensation should be awarded them, that, for the sole purpose of attempting to minimize the value of their services, their reputations for truth, honesty and integrity are for the first time to be challenged. Perhaps neither of these gentlemen is personally known to this Honorable Court. They were examined and cross-examined before the Special Master at the hearing of these Objections and Exceptions, and we are satisfied that the Findings of the Special Master in this matter with regard to the services performed by these gentlemen, and the value thereof, were based not only upon the substance of their testimony, and that of each of them, but upon the forthrightness with which each of these gentlemen testified upon the witness-stand, and that the Special Master was convinced, after hearing this cause, that all of the insinuations and direct charges of the Objectors and Exceptors, and their counsel, against the integrity and good faith of these gentlemen, were each and all absolutely groundless and without any support whatsoever.

The facts, briefly stated, concerning the *ad interim* allowances, are as follows:

Applications were filed in the eastern jurisdiction for an Order directing the payment of a forty per cent (40%) dividend to the creditors, and for *ad*

interim allowances to the Receivers and Messrs. McManus, Ernst & Ernst. In the telegram dated December 8, 1926, set forth on page 16 of the Opening Brief, we find the following closing words:

> "Please get in touch with Love see Lieurance and Eliassen find out if possible what charges will be Stop *Advise results by wire* because we want to include your views in recommendation to Judge Hand." (Italics ours.)

From this telegram, it is apparent that William Frazer, the Chairman of the New York Creditors' Committee, was in a hurry for this information.

In the telegram appearing at bottom of page 15 of the Opening Brief, Mr. Arthur F. Gotthold, in his wire to Mr. Lieurance, says:

> "I shall be glad to know your views as to allowances to receivers and counsel *as soon as possible.*" (Italics ours.)

This wire again shows the need of immediate action. In a telegram from Messrs. McManus, Ernst & Ernst to A. F. Lieurance, appearing at pages 14 and 15 of the Opening Brief, we find the closing words:

> "At request Creditors' Committee no allowances were fixed for receivers or counsel until receiving some indication from you what *aggregate* amount you and Eliassen will request from Western jurisdictions. Will you please wire us approximately what *aggregate allowances will be so requested.*" (Italics ours.)

It will be noted that Messrs. McManus, Ernst & Ernst desire to know the *aggregate* of these allowances.

In the telegram from A. V. Love to A. F. Lieurance, appearing on page 15 of the Opening Brief, we find the following closing words:

> "Judge Hand has asked for our views and suggestions. Please *wire me* amounts you and Mr. Eliassen expect." (Italics ours.)

This telegram again shows the need for immediate action.

In his telegram of date December 9th, to Mr. Frazer, appearing at page 16 of the Opening Brief, Mr. A. V. Love states:

> "Talked to Lieurance long-distance today. He will not suggest amount of fees. Says will be satisfied with courts order."

In the telegram from Mr. Lieurance to Messrs. McManus, Ernst & Ernst, page 15 of the Opening Brief, Mr. Lieurance states:

> "No amount on account for attorneys and receivers in ancillary jurisdiction will be suggested by us. However, will ask for allowances on account, but amounts will be left entirely to discretion of courts. Feel this best and most fair method to pursue. Have not slightest idea of what courts will do, but feel they will be fair to both creditors and ourselves."

Thus we find Messrs. McManus, Ernst & Ernst fully informed that Mr. Eliassen and Mr. Lieurance would not make any estimate of what the *ad interim* allowances in the west would be, as they were to be left entirely to the judgments of the Courts.

In Exhibit "A" attached to the Objections and Exceptions in this matter, and appearing in Vol. I,

page 109, Transcript of Record, there is set forth what purports to be a telegram dated December 9, 1926, addressed to William Frazer, signed by Walton N. Moore. A very vital portion of this telegram was omitted, a portion which was dictated by Mr. Lieurance, and is as follows:

> "As you now know from yesterday's telegrams from Lieurance to Gotthold and Attorneys McManus, Ernst & Ernst, receiver Lieurance and attorneys in ancillary jurisdiction intend leaving amounts of allowances to discretion of ancillary courts."

Counsel for Objecting Creditors, while cross-examining Mr. Eliassen before the Special Master, read this telegram, but, in so doing, neglected to read these concluding words of the telegram until pressed to do so by counsel for Mr. Lieurance and Mr. Eliassen, all of which appears on pages 152 and 153 of the Reporter's Transcript of date October 19, 1927. From these telegrams, it is readily seen that Mr. William Frazer, Chairman of the New York Creditors' Committee, as well as Mr. Gotthold, Messrs. McManus, Ernst & Ernst, Mr. Walton N. Moore and Mr. A. V. Love, were all fully informed on December 9, 1926, that the question of the allowances in the western jurisdictions were not to be fixed or determined by conferences between these gentlemen and the creditors or Creditors' Committees, but were to rest entirely in the discretion of the various Courts in the western jurisdictions.

After the meeting at Mr. Kirk's office on December 9, 1926, mentioned on page 21 of the Opening Brief,

and, in accordance with the understanding there reached, and for the purpose of learning what the *aggregate ad interim* allowances in the western jurisdictions would be, Mr. Lieurance and Mr. Eliassen proceeded the following day with their applications to the United States District Court at San Francisco for Orders declaring a dividend of forty per cent (40%) to the Creditors, and for *ad interim* allowances. Thereafter, they proceeded immediately to the northwest, where they filed like applications and procured like Orders declaring a dividend of forty per cent (40%) to the creditors, and *ad interim* allowances. Immediately upon these matters being determined by the various Courts in the western jurisdictions, the telegram referred to on page 32 of the Opening Brief, from Mr. Lieurance to Mr. Moore, was forwarded to Mr. Moore.

As hereinbefore mentioned, a controversy exists between Mr. Kirk and Mr. Moore on the one hand, and Mr. Eliassen and Mr. Lieurance on the other, as to what understanding was reached between them in regard to these matters at Mr. Kirk's office on December 9, 1926. There is no doubt whatever but that these gentlemen honestly disagree as to what understanding was really reached. There can be no doubt, however, but that the understanding was that the *aggregate ad interim* allowances to be made in the west should be determined *promptly* and reported to the eastern jurisdiction, and it was likewise clearly understood that the applications for the dividends to the creditors should be made *at once,* and we submit that it is only reasonable that, to avoid two journeys

into the northwest, the applications for *ad interim* allowances should be made simultaneously with those for the Orders declaring the dividends.

But, as we have hereinbefore stated, the aggregate of these *ad interim* allowances was reduced by Stipulation of the parties, and the final fixation of fees of Mr. Lieurance and Mr. Eliassen was made by the United States District Court in and for the Northern District of California, Southern Division, after the hearing of these Objections and Exceptions before the Special Master, and upon his report and findings.

In his letter of January 10, 1927, to Mr. E. J. Hopkins, Credit Manager for Roberts, Johnson & Rand, hereinbefore referred to, Mr. Lieurance, while opposing the setting aside of the Courts' Orders fixing these *ad interim* allowances, states, among other things:

> "However, we are not opposed to a review of this situation, and are ready and willing to go before all of the Judges in open Court, in the presence of any and all creditors, and have the matter re-viewed. If the Courts see fit to change their decisions, we shall abide by such decisions with grace, and if the Courts still feel that the compensation and fees allowed are fair and equitable, we shall be content to let them stand as they are. We have indicated this to both Mr. Moore and Mr. Kirk, and have expressed our willingness to have this matter re-viewed at any time, which suits their convenience or the convenience of other creditors."

Needless to say, in whatever walk of life we find ourselves, a good reputation for truth, honesty and integrity is the most valuable asset we can possess. A man's good name is quite as dear to him as life

itself. He is entitled to protection from all unwarranted and unfounded attacks against it. There is nothing whatever to be found in the entire record in this case which can be justly construed as furnishing the slightest support for any of these charges and attacks made upon the truthfulness, honesty or integrity of either Mr. Eliassen or Mr. Lieurance.

WHEREFORE, it is respectfully submitted:

1. That none of the fees allowed in this matter are grossly, or at all excessive;

2. That the trial Court did not err in any of the particulars set forth by appellants in their Assignment of Errors;

3. That there was no abuse of discretion on the part of the trial Court in this matter;

4. That the judgment and decree of the trial Court of March 27, 1928, should be affirmed without modification;

5. That appellants should be denied any costs herein;

6. That appellees should be allowed their costs herein incurred.

Dated, Oakland,
December 4, 1929.

Respectfully submitted,

EDWARD R. ELIASSEN,
CROSBY & CROSBY,
Attorneys for Receiver
A. F. Lieurance, and
Edward R. Eliassen
Attorney for Receivers.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WALTON N. MOORE DRY GOODS CO. (a corporation), J. H. NEWBAUER & COMPANY (a corporation), G. W. REYNOLDS CO., INC. (a corporation), and L. DINKELSPIEL CO., INC. (a corporation), *Appellants,* vs. A. F. LIEURANCE and PHILIP A. HERSHEY as Receivers of R. A. Pilcher Co., Inc. (a corporation), Bankrupt, *Appellees.*	In Equity No. 5660

CLOSING BRIEF OF OBJECTING CREDITORS.

FRANCIS J. HENEY,
Rowan Building, Los Angeles,
CLARENCE A. SHUEY,
Merchants Exchange Building, San Francisco,
GRANT H. WREN,
444 Market Street, San Francisco,
Attorneys for Objecting Creditors.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WALTON N. MOORE DRY GOODS CO. (a corporation), J. H. NEWBAUER & COMPANY (a corporation), G. W. REYNOLDS CO., INC. (a corporation), and L. DINKELSPIEL CO., INC. (a corporation), *Appellants,* vs. A. F. LIEURANCE and PHILIP A. HERSHEY as Receivers of R. A. Pilcher Co., Inc. (a corporation), Bankrupt, *Appellees.*	In Equity No. 5660

CLOSING BRIEF OF OBJECTING CREDITORS.

The reply brief for A. F. Lieurance, as Receiver, and Edward R. Eliassen, as his attorney, is interspersed with attacks upon the motives of the objecting creditors and their attorneys in initiating and prosecuting these proceedings. Neither the opening brief for the objecting creditors, nor the transcript of record contains anything which justifies such attacks. We are certain, however, that the members of this honorable court are not concerned with such side issues, and hence we shall not waste any of their valua-

ble time by attempting to answer these attacks in kind or otherwise.

That brief also sets up one fictitious straw issue after another, and then proceeds to demolish it. One example will suffice. For instance, on pages 84 and 85 thereof, the following appears:

> "Again, in an effort to show that there was some especially friendly relationship existing between Mr. Lieurance and Mr. A. V. Love, which prompted Mr. Love to so express himself, the Objecting Creditors, on page 50 of their Opening Brief, say:
>
> > 'By way of illustration, the Penney Company have been selling large amounts of merchandise to A. V. Love & Company at Seattle, Washington (one of the largest creditors of Pilcher & Co., Inc.) Mr. Lieurance so testified.
> >
> > 'Did the receivership for Pilcher & Co., Inc., as conducted by Mr. Lieurance, do likewise and make *large sales* of goods at a profit to A. V. Love & Company? No, *on the contrary,* the receivership purchased substantially large quantities of goods from Love & Company and it is fair to infer that Love & Company made a reasonable profit upon the thing.'"

If the court will turn to page 50 of our opening brief, it will readily discover that the portion quoted therefrom was not used "in an effort to show that there was some especially friendly relationship existing between Mr. Lieurance and Mr. A. V. Love" which prompted Mr. Love to write a letter to Mr. Frazier, the chairman of the New York creditors' committee, approving the work of Messrs. Lieurance and Eliassen, and refusing to object to the amount of fees which had been allowed to them by the court.

On the contrary, the quoted part of our opening brief was used solely as a part of our argument to the effect that the Receiver in the case at bar was not called upon to exercise his talents along the line of the main purpose for which an expert in the running of chain stores would be required to exercise it, to-wit, that of purchasing various kinds of merchandise in very large quantities so as to secure the cheapest price possible, and of shipping them in carload lots so as to secure the cheapest freight possible. The argument had nothing whatever to do with the question of the existence or non-existence of friendly relations between Mr. Lieurance and Mr. A. V. Love as a basis for the latter's approval of the fees which had been allowed by the court to Mr. Lieurance.

In our "Statement of the Case" in our opening brief, we have recited undisputed facts only, and have stated them with fairness to both sides of this controversy.

Some alleged facts, outside of the record, have been injected into their reply brief by the attorneys for Mr. Lieurance and Mr. Eliassen, and solely by way of response thereto, we shall presently call the attention of this court to a letter recently received by Mr. Wren from Mr. Ernst, who was appointed by the New York court of original jurisdiction herein as attorney for the Receivers.

REAL AND SOLE ISSUES REQUIRING CONSIDERATION.

It stands as an admitted fact in this proceeding that the net amount obtained by the Receivers from the sale of assets is the sum of $466,980.40.

The aggregate amount allowed in both jurisdictions for Receivers' fees is $42,500.00 and for attorneys' fees $45,000.00.

The correct rule of law to be applied in fixing the amount to be paid to the Receivers in this case seems to be the one which was laid down in the case of *Grant v. Bryant,* 101 Mass. 570, to-wit, that the Receivers should be allowed only "such an amount as would be reasonable for the services *required* of and rendered by a person of *ordinary* ability and competent for such duties and services."

If this is a correct statement of the law, it seems to follow logically that the aggregate amount of $42,-500.00 which was allowed to the Receivers in this case is excessive, and that manifest error was committed by the lower court in making the allowances herein.

Moreover, it stands undisputed in this proceeding that no extraordinary services were performed by the attorneys for the Receivers in either or any jurisdiction. Hence, the aggregate amount of $45,000.00 for attorneys' fees also seems to be excessive for the reasons set forth in our opening brief.

In our opening brief we have not attacked either the motives or character of the Receiver Lieurance or his attorney. We merely have quoted certain cor-

respondence by letters and telegrams between Mr. Lieurance and his co-Receiver, Mr. Gotthold, and have called attention to certain significant omissions from the telegrams sent by Mr. Lieurance to Mr. Gotthold. If it follows as a natural and irresistible inference therefrom that Mr. Lieurance endeavored to make an unfair contract with Mr. Gotthold regarding fees by concealing material facts from him and also by attempting to mislead him into the belief that Mr. Lieurance was in Oakland when in truth and in fact he was in Portland, Oregon, securing the last of his *ad interim* allowances of fees, it is not our fault and Mr. Lieurance has no one to blame but himself if those telegrams indicate that he was not acting in that high degree of good faith toward his co-Receiver which is imposed upon him by the law.

From that correspondence (and all thereof is set forth in our opening brief) the inference seems irresistible and inescapable that Mr. Lieurance wilfully and deliberately brought about the situation which resulted in the allowance of excessive fees in the aggregate for the New York and the western jurisdictions by refusing to aid Judge Hand or the Creditors' Committee in New York with information which it was his legal duty to give at least to his co-Receiver, Mr. Gotthold, for the protection of the creditors who were the equitable owners of the fund which was in his hands. We have discussed this point quite fully in our opening brief.

In conclusion, we merely desire to add that after the reply brief for the Receiver and his attorney had

been served upon us, Mr. Grant H. Wren wrote to Messrs. McManus, Ernst & Ernst requesting information regarding the matters outside of the record which have been inserted in the aforesaid reply brief, and he received a reply from them dated December 6, 1929, which contains the following statements regarding that matter:

> Grant H. Wren, Esq.,
> 444 Market Street,
> San Francisco, California.
> My dear Mr. Wren:
>
> Re: R. A. Pilcher Co., Bankrupt
>
> (First paragraph of the letter omitted because it is of a personal nature.)
>
> Coming now to the matter you mention in your letter of the 29th ultimo, you will recall that there were many claims pending and undetermined before Mr. Cardozo, appointed Special Master to hear and determine claims to which objections had been filed. There were three claims which differed from all the rest in that they were not based upon Account Payable for merchandise, but were predicated on the sale of stock by the corporation and the attempted rescission by the stockholders of the respective contracts made between them and the company, prior to the bankruptcy. Much testimony was taken in connection with these claims and elaborate briefs were submitted. The Mandel claim differed from the other two, and the testimony indicated that there was a fair chance of the claimant succeeding. It was then that we attempted to adjust the matter on a basis of 50% of the amount of the claim, that is, the Receiver here offered to allow the claim for 50% of the amount for which it was filed, and to pay a dividend on the reduced amount. That, in effect, would give the claimant 25% of the amount of his claim. To induce the claimant to accept that compromise it was pointed out to

Mandel's attorney that it was possible that he might win his case and there be no money left for him. That brought up the question as to whether the Receiver here would be personally liable in the event that the Mandel claim was allowed in full and there were insufficient moneys to pay it.

With all these circumstances before us it was deemed advisable to make the adjustment and the agreement was accordingly made that the Mandel claim be allowed at 50% of the amount for which it was filed, dividend to be paid out of money then in the hands of Mr. Gotthold, as Receiver, or subsequently to come into his hands. Eventually moneys were sent by Lieurance to Mr. Gotthold and such moneys were used to pay the fees of the Special Master and to pay the Referee, Mr. Stephenson, and the balance was used to pay Mr. Mandel. When it was determined that there would be insufficient to pay Mandel in accordance with the stipulation made by us we prevailed upon the attorneys for Mandel to accept what was left, and we were fortunate in succeeding in having that attorney acquiesce, and in obtaining an order closing the situation.

The order gives to Mandel the balance of moneys *then* in the possession of Mr. Gotthold, and in one instance those moneys are described as "balance in his *possession*" but that balance was fixed at $499.76, and certainly there can be no contention that Mandel is entitled to any other moneys which might hereafter come into the possession of Gotthold, or to the possession of which Gotthold was then entitled. The situation was dealt with as it then existed, and we were considering only the funds which Mr. Gotthold *then* had in his possession, and which he was then able to distribute.

Moreover, it was well understood at that time that an action or proceeding was pending to compel Lieurance and Eliassen to pay back certain

moneys, and in the petition upon which the order of December 10th, 1928, was based there appears the following language:

> "No assets have been turned over to the Trustee in Bankruptcy, nor will there be any assets to be turned over to said Trustee unless Mr. Lieurance and his attorney Edward R. Eliassen, Esq., turn back, or are forced to turn back in proceedings brought by certain creditors, a part of the fees awarded to them in the ancillary proceedings in California."

Therefore, it will be observed that even though there was a disposition of the moneys *then* available to Mr. Gotthold (that is, in November, 1928) it was clearly understood and represented to the Court that additional moneys might come into the estate. But it was also understood, and it must now be understood, that those moneys, if they are brought into the estate, must be delivered to or paid over to the Trustee in Bankruptcy.

You will also recall that all of the claims filed in the equity proceedings have been lodged with the Referee in Bankruptcy, and in the event that any money is received from Lieurance and Eliassen (and we fully expect that there will be a return of such money) that money will be immediately distributed in the bankruptcy proceedings.

As above stated, all claims have been filed with the Referee, and it will be a comparatively simple matter to prepare a dividend sheet and distribute the moneys in the same way as they were distributed in the equity proceedings.

Further, Mr. Gotthold, the Trustee in Bankruptcy, has reported to the Referee in Bankruptcy from time to time, and in all of those reports a mention of the proceedings now pending in the Circuit Court of Appeals in the Ninth Circuit has been made and the Referee is fully advised thereof.

This letter is being written at some length and in some detail because you asked for a full statement. Naturally you may use all or none of it.

Sincerely yours,

WEE/VC Walter E. Ernst.

Dated, San Francisco,
December 23, 1929.

Respectfully submitted,

FRANCIS J. HENEY,
CLARENCE A. SHUEY,
GRANT H. WREN,
Attorneys for Objecting Creditors.

No. 5661

United States

Circuit Court of Appeals

For the Ninth Circuit.

PORTLAND CREMATION ASSOCIATION, a Corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record.

UPON PETITIONS TO REVIEW ORDERS OF THE UNITED STATES BOARD OF TAX APPEALS.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 5661

United States

Circuit Court of Appeals

For the Ninth Circuit.

PORTLAND CREMATION ASSOCIATION, a Corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record.

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Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[1*] DOCKET 10037.

PORTLAND CREMATION ASSOCIATION,
East 14th Street & Bybee Ave., Portland, Oreg.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

For the Taxpayer:

GEO. W. JOSEPH, Esq.
CHAS. E. McCULLOCH, Esq.

For the Commissioner:

SHELBY S. FAULKNER, Esq.
W. F. GIBBS, Esq.

DOCKET ENTRIES.

1925.

Dec. 17—Petition received and filed.

Dec. 23—Copy of petition served on solicitor.

Dec. 23—Notification of receipt mailed taxpayer.

1926.

Jan. 22—Answer filed by solicitor.

Jan. 29—Copy of answer served on taxpayer. Assigned to field calendar.

1927.

Feb. 15—Hearing set 4–18–27, Portland, Oreg.

April 18—Hearing had before Mr. Arundell. To

*Page-number appearing at the top of page of original certified Transcript of Record.

be consolidated with 22158 and 23912. Submitted upon stipulation of facts. Briefs due 7–1–27.

May 9—Transcript of hearing 4–18–27 filed.

June 28—Memorandum brief filed by G. C.

July 1—Order granting taxpayer extension to 7–15–27 to file brief signed and filed. Both sides notified.

July 4—Brief filed by taxpayer. (Proposed findings included.)

1928.

Jan. 20—Findings of fact and opinion rendered (Sternhagen). Judgment will be entered on 15 days' notice under Rule 50.

Mar. 9—Motion for redetermination filed by G. C.

Mar. 13—Notice allowing taxpayer until 4–10–28 to file alternative settlement for hearing on 4–19–28. Failure to do so, appeal set for 4–17–28.

April 17—Hearing had before Mr. Littleton on settlement. Assigned Mr. Sternhagen.

April 19—Judgment entered.

Oct. 18—Petition for review by U. S. Cir. Ct. of Appeals, 9th Circuit, with assignments of error filed by taxpayer.

Oct. 19—Proof of service filed.

Oct. 26—Praecipe for record filed by taxpayer.

Oct. 26—Proof of service filed.

Now, December 7, 1928, the foregoing docket entries certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[2] DOCKET 22158.

PORTLAND CREMATION ASSOCIATION,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

For the Taxpayer:
GEO. W. JOSEPH, Esq.
CHAS. E. McCULLOCH, Esq.

For the Commissioner:
SHELBY S. FAULKNER, Esq.
W. F. GIBBS, Esq.

DOCKET ENTRIES.

1926.

Dec. 27—Petition received and filed. Taxpayer notified.

Dec. 28—Copy of petition served on general counsel.

1927.

Feb. 26—Answer filed by G. C.

Mar. 26—Copy of answer served on taxpayer. Circuit Calendar.

April 12—Hearing set 4–18–27 Portland, Oreg.

April 18—Hearing had before Mr. Arundell on stipulation of facts. Consolidated with 10037 and 22912. Briefs due 7–1–27.

May 9—Transcript of hearing 4–18–27 filed.

June 28—Memorandum brief filed by G. C.

July 1—Order granting extension to 7–15–27 to file brief for the taxpayer signed and filed. Both sides notified.

July 4—Brief filed by taxpayer. (Proposed findings included.)

1928.

Jan. 20—Findings of fact and opinion rendered (Sternhagen). Judgment will be entered on 15 days' notice under Rule 50.

Mar. 9—Motion for redetermination filed by G. C.

Mar. 13—Notice allowing taxpayer until 4–10–28 to file alternative settlement for hearing 4–19–28. Failure to do so, appeal set for 4–17–28.

April 17—Hearing had before Mr. Littleton on settlement. Assigned to Mr. Sternhagen for order.

April 19—Judgment entered.

Oct. 18—Petition for review by U. S. Cir. Ct. of Appeals, 9th Circuit, with assignments of error filed by taxpayer.

Oct. 19—Proof of service filed.

Oct. 26—Praecipe for record filed by taxpayer.

Oct. 26—Proof of servce filed by taxpayer.

Now, December 7, 1928, the foregoing docket entries certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[3] DOCKET 23912.

PORTLAND CREMATION ASSOCIATION,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

For the Taxpayer:
GEO. W. JOSEPH, Esq.
CHAS. E. McCULLOCH, Esq.

For the Commissioner:
SHELBY S. FAULKNER, Esq.
W. F. GIBBS, Esq.

DOCKET ENTRIES.

1927.

Feb. 9—Petition received and filed. Taxpayer notified.

Feb. 11—Copy of petition served on General Counsel.

Mar. 19—Answer filed by G. C.

April 1—Copy of answer served on taxpayer. Assigned Circuit Calendar.

April 12—Hearing date set 4–18–27, Multnomah County Court House, Portland, Oreg.

April 18—Hearing had before Mr. Arundell on stipulation of facts. Briefs due 7–1–27.

May 9—Transcript of hearing 4–18–27 filed.

June 28—Memorandum brief filed by G. C.

July 1—Order extending time to 7–15–27 to file brief signed and filed. Both sides notified.

July 4—Brief filed by taxpayer. (Proposed findings included.)

1928.

Jan. 20—Findings of fact and opinion rendered (Mr. Sternhagen). Judgment will be entered on 15 days' notice under Rule 50.

Mar. 9—Motion for redetermination filed by G. C.

Mar. 13—Notice allowing taxpayer until 4–10–28 to file alternative settlement for hearing 4–19–28. Failure to do so, hearing date set 4–17–28.

April 17—Hearing had before Mr. Littleton on settlement under Rule 50. To Mr. Sternhagen for order.

April 20—Judgment redetermining deficiency entered.

Oct. 18—Petition for review by U. S. Cir. Ct. of Appeals, 9th Circuit, with assignments of error filed by taxpayer.

Oct. 19—Proof of service filed.

Oct. 26—Praecipe for record filed by taxpayer.

Oct. 26—Proof of service filed by taxpayer.

Now, December 7, 1928, the foregoing docket entries certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[4] Filed Dec. 17, 1925. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 10037.

Appeal of PORTLAND CREMATION ASSOCIATION, East 14th St. and Bybee Ave., Portland, Oregon.

PETITION.

The above-named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter (IT:E:SM:60D:RJR:B–17263) dated November 3, 1925; further explained in Bureau letter (IT:CA:Ms:2501–JM) dated February 5, 1923; and Bureau letter (IT:E:SM:RLC:B–17263) dated May 22, 1925 (Copies of each letter attached), and as a basis of its appeal sets forth the following:

(1) The taxpayer is a corporation organized under the laws of the State of Oregon, incorporated and commenced business April 24, 1900, its principal office and place of business being located at East Fourteenth Street and Bybee Avenue, Portland, Oregon.

(2) The final deficiency letter was dated November 3, 1925, the date of mailing to the taxpayer being unknown. For full explanation of the controversy it will be necessary to refer to Bureau letters of February 5, 1923 and May 22, 1925.

(3) The taxes in controversy are income and

profits taxes for the calendar year 1919 and are less than $10,000, to wit, the sum of $5764.69.

(4) The determination of tax contained in said deficiency letters is based upon the following error:

In determining the taxpayer's net income for 1919, the amount of $12,827.16 set up and deducted for 1919 as a Reserve for Maintenance, has been erroneously added to taxable income, such addition resulting in the major part of the proposed tax of $5764.69. The item of $94.22 restored to taxable income by the Commissioner on the theory that it was a capital expenditure, is not contested.

(5) The facts upon which the taxpayer relies as the basis of its appeal are as follows:

This corporation has an incinerator plant for the cremation of human bodies, and constructs, maintains and operates columbaria, or niches, for the preservation of the ashes of the remains so incinerated. It also erects, maintains and operates vaults for the reception and burial of human remains not incinerated.

The vaults and niches are sold under contracts providing for perpetual care therefor. To make this liability clear and thoroughly understood, copies of each contract are hereto attached, marked Exhibit "A."

The covenant on the part of the taxpayer to so maintain each vault and niche forever is embodied in each contract issued, [5] and the provision for maintenance is incorporated in both the original articles and the supplementary articles of said corporation.

The growth of the corporation was small during the first years of its existence, and it was not until 1913 that the necessity for a trust fund to carry out the terms of the contracts became so apparent that the Board of Directors by resolution dated March 4, 1913, established a perpetual care fund by setting aside ten per cent of the gross receipts from sale of vaults and niches.

The corporation continued to operate under this provision until the year 1919 when by resolution of the stockholders, the Board of Directors were instructed to increase the percentage for the Reserve for Maintenance to 20%, which amount has been so set aside as a Reserve for Maintenance since.

The Reserve for Maintenance is set up as a liability account for a specific purpose, to wit: the strict fulfillment and compliance with the contracts of the holders of niches and vaults. Not one dollar of this fund inures to the benefit of the stockholders. It is a trust fund created by the clients who purchased niches and vaults. The sums so segregated are a sacred trust, created for this one purpose only, and in no sense is it a profit of or benefit to, the stockholders of the corporation.

The Reserve for Maintenance cannot be considered taxable income, as there is no element of profit in the maintenance fund itself. The only possible element of profit connected with this trust fund set up for perpetual care is that the income from the fund is used in the care and maintenance of the vaults and niches. This income is mingled

with other income of the taxpayer, and accounted for in the income tax returns of the taxpayer.

(6) The taxpayer, in support of its appeal, relies upon the following propositions of law:

(a) The sums received by a corporation of this nature for the purpose of carrying out its contracts for perpetual care, and without which the contracts issued could never be carried to completion, do not fall within the definition of gross income as defined in section 233(a) and 213 of the Revenue Act of 1918.

(b) The taxpayer sells nothing upon which a gain can be made, to a person who holds a contract for perpetual care. (Ex. "A.")

(c) No part of the Reserve for Maintenance can be diverted by the Directors from this fund to any other fund, or for the general use of the corporation.

(d) The taxpayer, as a trustee, can exercise no discretion as to the distribution of the funds accumulated from perpetual care contracts. It is bound to perform a definite service with the fund, and from this service there can be no gain which would be taxable income.

(e) Without this Reserve for Maintenance, the taxpayer could never carry out the terms of its contracts; the fund is a necessity to guarantee the fulfillment of the taxpayer's obligation. Therefore, this fund, set aside for a specific and necessary purpose, is not, and never can become, a gain or profit

to the corporation. There being no element of profit, there can be no taxable income.

[6] (f) A study of the contracts indicate that what is actually sold is the right to use a vault or niche assigned to the purchaser forever, but such vault or niche remains in the custody and care of the association. The corporation, in addition, obligates itself to maintain the vault or niche for the purchaser, without expense, for an unlimited period of time, specified as "forever" in the contract itself. Under these conditions, it is clearly erroneous to allocate the entire receipts from the sale as a profit in the year contract is made and the money collected. It can surely not be construed that the money received for a service which will extend over a long period of time, the cost of which service cannot be determined at the date the money is paid, is a realized profit as of the date so received. Yet this is the contention of the Commissioner.

(g) We are content to allow the Reserve for Maintenance to be considered sufficient to carry out the contracts of the corporation, and to return the 80% of the gross sales as taxable income. If this cannot be done, we ask that the Board determine the contract to be a lease over a long period, and the payments received be construed as rentals, paid in advance, and as such to be included in profits only as realized, over a period of time which might approximate 100 years. This adjustment might give the needed relief. This procedure is suggested only in the event that relief is otherwise impossible.

WHEREFORE, the taxpayer respectfully prays that this Board may hear and determine its appeal.

GEO. W. JOSEPH,
Counsel for Taxpayer,
Corbett Building, Portland, Oregon.

State of Oregon,
County of Multnomah,—ss.

Geo. W. Baldwin, being duly sworn, says that he is vice-president of the Portland Cremation Association, above named, and as such is duly authorized to verify the foregoing petition; that he has read the said petition, or had the same read to him, and is familiar with the statements therein contained, and that the facts therein stated are true, except such facts as are stated to be upon information and belief, and those facts he believes to be true.

GEO. W. BALDWIN.

Sworn to before me this 30 day of November, 1925.

[Seal] E. V. LITTLEFIELD,
Notary Public.

My commission expires March 22, 1929.

[7] Nov. 3, 1925.

IT:E:SM–60D.
RJR:B–17263.
Portland Cremation Association,
E. 14th & Bybee,
Portland, Oregon.

Sirs:

An audit of your income and profits tax return for the year ended December 31, 1919, has resulted in the determination of a deficiency in tax of $5,-764.69, as shown in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1924, you are allowed 60 days from the date of mailing of this letter within which to file an appeal to the United States Board of Tax Appeals contesting in whole or in part the correctness of this determination.

Where a taxpayer has been given an opportunity to appeal to the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the inclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:E:SM:60D—RJR:B–17263.

In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,

D. H. BLAIR,
Commissioner.

By C. R. NASH,
Assistant to the Commissioner.

Inclosures:
Statements.
Agreement—Form A.

STATEMENT.

IT:E:SM:60D.
RJR:B–17263.
In re: PORTLAND CREMATION ASSOCIATION, E. 14th & Bybee, Portland, Oregon.

	Deficiency
1919	$5764.69

Further explanation of the adjustment is shown in Bureau letters dated February 5, 1923, and May 22, 1925.

After a careful review of your protest and of all the evidence submitted in support of your contentions, you are advised that [8] the Bureau holds that an audit of your case discloses the fact that your profits tax as computed under Section 301 is not in excess of the average profits tax paid by a group of representative concerns engaged in a like or similar trade or business to that of your company. Accordingly, the conclusions set forth in the above-mentioned letters are sustained.

[9] February 5, 1923.

IT:CA:Ms–2501.
JM.
Portland Cremation Association,
E. 14th St. & Bybee Avenue,
Portland, Oregon.

Sirs:

An examination of your income tax return for the year 1919 discloses an additional tax liability for the year 1919 aggregating $5764.69, and over-assessment for the year —— amounting to $—— as shown in detail in the attached statement.

In accordance with the provisions of Section 250 (d) of the revenue Act of 1921, you are granted thirty days within which to file an appeal and show cause or reason why this tax or deficiency should not be paid. No particular form of appeal is required, but if filed it must set forth specifically the exceptions upon which it is taken, shall be under oath, contain a statement that it is not for the purpose of delay, and the facts and evidence upon which you rely must be fully stated. The appeal, if filed, must be addressed to the Commissioner of Internal Revenue, Washington, D. C., for the specific attention of IT:CA:Ms, 2501–JM, and will be referred to the Income Tax Unit before transmittal to the agency designated for the hearing of such appeals.

You may, if you desire, request a conference before the Income Tax Unit in connection with the appeal, to be held within the period prior to the expiration of five days after the time prescribed

for the filing of the appeal. If the Income Tax Unit is unable to concede the points raised in your appeal, it will be transmitted, together with the recommendation of the Income Tax Unit, to such agency as the Commissioner may designate for final consideration.

Where a taxpayer has been given an opportunity to appeal and has not done so, as set forth above, and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement of the assessment will be entertained.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

Respectfully,
E. W. CHATTERTON,
Deputy Commissioner,
By M. R. CLUTE,
Head of Division.

STATEMENT.

Feb. 5, 1923.

IT:CA:Ms.
2501–JM.

[10] In re: PORTLAND CREMATION ASSOCIATION, E. 14th St. & Bybee Ave., Portland, Oregon.

Additional Tax—$5764.69.

The above additional tax is due to increasing net income by the following amounts:

Expenditure for Carpet and Iron Basket	$ 94.22
Deduction from Gross Sales for Maintenance Fund	$12827.16
Total addition to net income	$12921.38

The first two items are capital expenditures.

The charge to Reserve for Maintenance, $12,827.16 is not a proper deduction from gross income.

[11] May 22, 1925.

IT:E:SM
RLC–B–17263
Sirs:

An audit of your income and profits tax return for the year 1919, has resulted in the determination of a deficiency in tax of $5,764.69 as shown by Bureau letter dated February 5, 1923.

You are granted 30 days from the date of this letter within which to present a protest, supported

by additional evidence or brief, against this determination of a deficiency. Any additional evidence submitted should be under oath. Upon request submitted within the period mentioned, you will also be granted a hearing in the Bureau with reference to the matter.

A request for a hearing should contain (a) the name and address of the taxpayer; (b) in the case of a corporation, the name of the State of incorporation; (c) a designation by date and symbol of the notice or notices with respect to which the hearing is desired; (d) a designation of the year or years involved and a statement of the amount of tax in dispute for each year; (e) an itemized schedule of the findings of the Unit to which the taxpayer takes exception; and (f) a summary statement of the grounds upon which the taxpayer relies in connection with each exception.

If, after consideration of any additional evidence submitted and any arguments advanced by you, a deficiency is finally determined by the Bureau to be due from you, you will, in accordance with the provisions of Section 274 of the Revenue Act of 1924, be advised by registered mail of the final determination of the Commissioner as to the amount of the deficiency, and allowed 60 days from the mailing of the letter in which to file an appeal to the United States Board of Tax Appeals in the event you do not acquiesce in such final determination.

If you acquiesce in the determination of a deficiency as disclosed in this letter and the accompanying statements, you are requested to sign the in-

closed agreement consenting to the assessment of such deficiency, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:E:SM RLC:B–17263. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,
(Signed) J. G. BRIGHT,
Deputy Commissioner.

Inclosures:
Statements
Agreement—Form A

STATEMENT.

IT:E:SM.
RLC:B–17263.
In re: PORTLAND CREMATION ASSOCIATION, East 14th Street & Bybee Ave., Portland, Oregon.

[12] 1919

Deficiency in Tax $5,764.69.

You are advised that after careful consideration and review your application under the provisions of Section 327 for assessment of your profits tax as prescribed by Section 328 of the Revenue Act of 1918, has been denied in view of the fact that it is found that your profits tax as computed under the provisions of Section 301 is not in excess of the average profits tax paid by a group of representative concerns which in the aggregate, may be said to be engaged in a like or similar trade or business to that of your company.

In accordance with the above action the additional tax of $5,764.69 as shown by Bureau letter dated February 5, 1923, is affirmed.

Now, December 7, 1928, the foregoing petition certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[13] Filed Jan. 22, 1926. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 10037.

In re: Appeal of PORTLAND CREMATION ASSOCIATION, East 14th St. and Bybee Avenue, Portland, Oregon.

ANSWER.

The Commissioner of Internal Revenue by his attorney, A. W. Gregg, Solicitor of Internal Revenue, for answer to the petition of the above-named taxpayer, admits, denies and avers, as follows:

(1) Admits the allegations contained in paragraphs 1 and 3 and the first sentence of paragraph 2.

(2) Admits that taxpayer's income for 1919 was increased by the amount of $12,827.16 representing amounts set up on its books for perpetual maintenance.

(3) Admits that in 1913 a 10 per cent reserve for maintenance was set up by the Board of Directors which amount was increased to 20 per cent in 1919. It is alleged that the contracts with the holders of niches and vaults referred to in the petition do not create a trust fund for perpetual maintenance but merely obligate the taxpayer to perpetually maintain the niches and vaults.

(4) Denies each and every other material allegation of fact contained in the petition.

PROPOSITION OF LAW.

The taxpayer has not set apart a trust fund for perpetual maintenance but has merely obligated itself by enforceable contract to maintain the niches and vaults. (See Appeal of Springdale Cemetery Association decided December 21, 1925.)

[14] WHEREFORE it is prayed that taxpayer's petition be dismissed and the appeal denied.

A. W. GREGG,

Solicitor of Internal Revenue, Attorney for Commissioner of Internal Revenue.

Of Counsel:

A. H. FAST,

Special Attorney, Bureau of Internal Revenue.

Now, December 7, 1928, the following answer certified from the record as a true copy.

[Seal] B. D. GAMBLE,

Clerk, U. S. Board of Tax Appeals.

[15] Filed Dec. 27, 1926. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 22158.

PORTLAND CREMATION ASSOCIATION,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION.

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:CA:2554–16–60D) dated November 15, 1926, and as a basis of his proceedings alleges as follows:

1. The petitioner is a corporation organized under the laws of the State of Oregon, with its principal office and place of business located at East 14th Street and Bybee Avenue, Portland, Oregon.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the taxpayer on November 15, 1926.

3. The tax in controversy *are* income taxes for the calendar year of 1922, and for two thousand one hundred ninety-two dollars and twenty-five cents ($2,192.25).

4. The determination of tax set forth in notice of deficiency is based upon the following error:

(a) This taxpayer has an incinerator plant for the cremation of human bodies, and constructs, maintains and operates columbaria, or niches, for the preservation of the ashes of the remains so incinerated; it also erects, maintains and operates vaults for the reception and burial of human remains not incinerated.

(b) The vaults and niches referred to are sold under contracts providing for perpetual care and maintenance therefor. Copies of the deeds or contracts covering the sale of niches and vaults and the agreement for perpetual care are hereto attached, marked Exhibit "B."

[16] (c) In order to carry out the terms of the contracts this taxpayer, has for a long period of time, set aside into a maintenance fund twenty per cent of the sum received for the sales of vaults and niches. This action was taken by authority and under instructions of the stockholders of the corporation; it having been determined that this amount was necessary and adequate to maintain the vaults and niches sold in accordance with the terms of sale and guarantees thereon.

(d) An inspection of the plant of the taxpayer reveals the fact that several units have been constructed at a large cost, and that the niches and vaults in such units after being disposed of bring no further income to the corporation from the date so disposed of to the end of time. Each unit when disposed of and in use, not only ceases to be an asset

to the corporation, but at once becomes an actual and a continuing liability increasing annually with the age of the unit buildings.

(e) Due to the peculiar nature of the business and the necessity inherent to fulfill the sacred trusts imposed by the contracts of sale themselves, the establishment of an adequate maintenance fund is absolutely imperative. In no other manner can further care of the trusts be assured.

(f) There is no element of profit in the establishment of this taxpayer's Reserve for Maintenance and it is in no sense taxable income.

(g) The principle permitting the establishment of a duly authorized maintenance fund, properly treated as a trust fund has been established in the case of Cemetery Associations by decisions of the United States Board of Tax Appeals concurred in by the Commissioner of Internal Revenue. While this taxpayer is not a Cemetery Association, still its obligations to properly maintain its vaults and niches sold under the contracts referred to are similarly binding. This taxpayer, however owing to the construction of its plant, requires a larger Reserve for Maintenance than would be necessary in an ordinary Cemetery Association. Reference is made to Docket No. 293, Decision 713, of the United States Board of Tax Appeals in the case of the Los Angeles Cemetery Association.

(h) The sums received by the corporation for the Reserve for Maintenance are and always have been treated as a trust fund. No part of the Reserve for Maintenance can be diverted by the Di-

rectors from this fund to any other fund or for the general use of the corporation. Such trust funds must at all times be used only for the purpose of carrying out the written contracts and guarantees of the petitioner.

[17] 6. Wherefore the petitioner prays that this Board may hear the proceedings and determine that the Reserve for Maintenance in the sum of seventeen thousand five hundred thirty-eight dollars and three cents ($17,538.03) be not included in the ordinary business and net income of this taxpayer for the calendar year 1922; that there is no deficiency due from the petitioner for the year 1922.

(Signed) GEO. W. JOSEPH,
Counsel for Petitioner,
Yeon Building, Portland, Oregon.

State of Oregon,
County of Multnomah,—ss.

E. M. Welch, being duly sworn, states that he is president of the Portland Cremation Association, the petitioner named in the foregoing petition, and as such is duly authorized to verify the foregoing petition and is familiar with the statements therein contained and that the facts therein stated are true.

E. M. WELCH.

Subscribed to before me this 20th day of December, A. D. 1926.

[Seal] E. V. LITTLEFIELD,
Notary Public for Oregon.

Commission expires Mar. 22, 1929.

[18] EXHIBIT "A"

TREASURY DEPARTMENT, WASHINGTON.

Office of

Commissioner of Internal Revenue

IT:GA:2554–16–60D

November 15, 1926.

Portland Cremation Association,
East 14th and Bybee Avenue,
Portland, Oregon.

Sirs:

The determination of your income tax liability for the year 1922, as set forth in office letter dated September 23, 1926, disclosed a deficiency in tax amounting to $2,192.25, as shown in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals. Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a

taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:GA:2554–16–60D.

In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,

D. H. BLAIR,
Commissioner.
By C. R. NASH,
Assistant to the Commissioner.

Inclosures:
Statement
Form A
Form 882

[19] STATEMENT.

IT:GA:2554–16–60D.

In re: PORTLAND CREMATION ASSOCIATION, East 14th and Bybee Avenue, Portland, Oregon.

Year	Deficiency in Tax.
1922	$2,192.25.

Net income reported on return	$30,324.85
Add:	
Addition to reserve for maintenance	17,538.03
Net income corrected	$47,862.88

EXPLANATION OF ADJUSTMENT.

Additions to the reserve for maintenance are held to constitute taxable income. (Article 541, Regulations 62.)

COMPUTATION OF TAX.

Net income subject to tax at 12½%	$47,862.88
Tax liability	$ 5,982.86
Tax assessed	3,790.61
Deficiency in tax	$ 2,192.25

Your protest dated October 8, 1926, has been considered and your contentions relative to the addition to reserve for maintenance must be denied. This decision is based upon a ruling made by the Bureau in connection with your return for the year 1919. In this decision it was held that the increase in the reserve for maintenance was taxable income.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

Now, December 7, 1928, the foregoing petition certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[20] Filed Feb. 26, 1927. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 22158.

PORTLAND CREMATION ASSOCIATION,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ANSWER.

The Commissioner of Internal Revenue by his attorney A. W. Gregg, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition.

4. Admits the allegations contained in subparagraphs (a) and (b) of paragraph 4 of the petition.

Denies each and every other material allegation of fact contained in the petition.

WHEREFORE, it is prayed that the Commissioner's determination be approved and that the petition be dismissed and the appeal denied.

A. W. GREGG,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
JULIAN G. GIBBS,
Special Attorney,
Bureau of Internal Revenue.

Now, December 7, 1928, the foregoing answer certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[21] Filed Feb. 9, 1927. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 23912.

PORTLAND CREMATION ASSOCIATION,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION.

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:E:SM:60D–RCH–C–30414–D–30415), dated January 18, 1927, and as a basis of his proceedings alleges as follows:

1. The petitioner is a corporation organized under the laws of the State of Oregon, with its principal office and place of business located at East 14th Street and Bybee Avenue, Portland, Oregon.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the taxpayer on January 18, 1927.

3. The taxes in controversy are income taxes for the calendar year 1920, forty-four hundred two and 68/100 dollars, and for the calendar year 1921, forty-five hundred nineteen and 65/100 dollars; the total for the two years being eighty-nine hundred twenty-two and 33/100 dollars.

4. The determination of tax set forth in notice of deficiency is based upon the following error:

[22] (a) This taxpayer has an incinerator plant for the cremation of human bodies, and constructs, maintains and operates columbaria or niches, for the preservation of the ashes of the remains so incinerated; it also erects, maintains and operates vaults for the reception and burial of human remains not incinerated.

(b) The vaults and niches referred to are sold

under contracts providing for perpetual care and maintenance therefor. Copies of the deeds or contracts covering the sale of niches and vaults and the agreement for perpetual care are hereto attached, marked Exhibit "B."

(c) In order to carry out the terms of the contracts this taxpayer, has for a long period of time, set aside into a maintenance fund twenty per cent of the sum received for the sales of vaults and niches. This action was taken by authority and under instructions of the stockholders of the corporation; it having been determined that this amount was necessary and adequate to maintain the vaults and niches sold in accordance with the terms of sale and guarantees thereon.

(d) An inspection of the plant of the taxpayer reveals the fact that several units have been constructed at a large cost, and that the niches and vaults in such units after being disposed of bring no further income to the corporation from the date so disposed of to the end of time. Each unit when disposed of and in use, not only ceases to be an asset to the corporation, but at once becomes an actual and a continuing liability increasing annually with the age of the unit buildings.

(e) Due to the peculiar nature of the business and the necessity inherent to fulfill the sacred trusts imposed by the contracts of sale themselves, the establishment of an adequate maintenance fund is absolutely imperative. In no other manner can further care of the trusts be assured.

(f) There is no element of profit in the establish-

ment of this taxpayer's Reserve for Maintenance and it is in no sense taxable income.

[23] (g) The principle permitting the establishment of a duly authorized Maintenance Fund, properly treated as a trust fund has been established in the case of Cemetery Associations by decision of the United States Board of Tax Appeals concurred in by the Commissioner of Internal Revenue. While this taxpayer is not a Cemetery Association, still its obligations to properly maintain its vaults and niches sold under the contracts referred to are similarly binding. This taxpayer, however, owing to the construction of its plant, requires a larger Reserve for Maintenance than would be necessary in an ordinary Cemetery Association. Reference is made to Docket No. 293, Decision 713, of the United States Board of Tax Appeals in the case of the Los Angeles Cemetery Association; Docket No. 3000, Decision 869, Greenwood Cemetery Association; Docket No. 437, Decision 1634, The Metaire Cemetery Association.

(h) The sums received by the corporation for the Reserve for Maintenance are and always have been treated as a trust fund. No part of the Reserve for Maintenance can be diverted by the Directors from this fund to any other fund or for the general use of the corporation. Such trust funds must at all times be used only for the purpose of carrying out the written contracts and guarantees of the petitioner.

6. Wherefore, the petitioner prays that this Board may hear the proceedings and determine that

the Reserve for Maintenance set aside by this taxpayer be not included in the ordinary business and net income of this taxpayer for the calendar years 1920 and 1921; that there is no deficiency due from the petitioner for the years 1920 and 1921.

E. V. LITTLEFIELD,
Counsel for Petitioner.
Yeon Building, Portland, Oregon.

[24] State of Oregon,
County of Multnomah,—ss.

Geo. W. Baldwin, being duly sworn, states that he is vice-president of the Portland Cremation Association, the petitioner named in the foregoing petition, and as such is duly authorized to verify the foregoing petition; that he is familiar with the statements therein contained, and that the facts therein stated are true.

GEO. W. BALDWIN.

Subscribed and sworn to this 3d day of February, 1927.

[Seal] E. V. LITTLEFIELD,
Notary Public for Oregon.

My commission expires March 22, 1929.

[25] EXHIBIT "A."

TREASURY DEPARTMENT,

WASHINGTON.

Office of
Commissioner of Internal Revenue.

January 18, 1927.

It:E:SM:60D.
RCH–C–30414.
D–30415.

Portland Cremation Association,
East 14th Street and Bybee Avenue,
Portland, Oregon.

Sirs:

An audit of your income and profits tax returns for the calendar years 1920 and 1921 has resulted in the determination of deficiencies in tax of $4,402.68 and $4,519.65, respectively, as shown in Bureau letter dated September 22, 1926.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 50 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60–day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of

Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the enclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:E:SM:60D:RCH–C–30414–D–30,-415. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,

D. H. BLAIR,

Commissioner,

By C. R. NASH,

Assistant to the Commissioner.

Inclosures:

Statement.

Form A.

Form 882.

[26] STATEMENT.

IT:E:SM:60D.
RCH–C–30414.
D–30415.

In re: PORTLAND CREMATION ASSOCIATION, East 14th Street and Bybee Avenue, Portland, Oregon.

Year.	Deficiency In Tax.
1920	$4,402.68
1921	4,519.65
Total	$8,922.33

Reference is made to your protest dated October 7, 1926, against the inclusion of increases in a maintenance fund in your taxable net income as shown in Bureau letters dated June 9, 1926, and September 22, 1926.

After a careful review of your protest and all the evidence submitted in support of your contentions, you are advised that the Bureau holds that the information on file is insufficient to warrant the exclusion from income of the items in question. It is stated in your protest that the question of the treatment of the additions to the maintenance fund is now before the United States Board of Tax Appeals with respect to an earlier year. It is noted, however, that no decision has yet been made by that Board; no allowance has, therefore, been

made on account of your protest covering the years 1920 and 1921.

The conclusions of which you were advised in Bureau letter dated September 22, 1926, are, therefore, sustained.

Now, December 7, 1928, the foregoing petition certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

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[27] Filed Mar. 19, 1927. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 23912.

PORTLAND CREMATION ASSOCIATION,
Portland, Oregon,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ANSWER.

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1. Admits the allegations contained in paragraph (1) of the petition.

2. Admits the allegations contained in paragraph (2) of the petition.

3. Admits the allegations contained in paragraph (3) of the petition.

4. Admits the allegations contained in sub-paragraphs (a) and (b) of paragraph (4) of the petition.

Denies each and every other material allegation of fact contained in the petition.

WHEREFORE, it is prayed that the Commissioner's determination be approved and that the petition be dismissed and the appeal denied.

A. W. GREGG,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
SHELBY S. FAULKNER,
Special Attorney, Bureau of Internal Revenue.

Now, December 7, 1928, the foregoing Answer certified from the record as a true copy.

[Seal] B. L. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[28] U. S. Board of Tax Appeals. Filed at Hearing, Apr. 18, 1927. Div. 7. Docket 10037, 22158, 22912.

The United States Board of Tax Appeals.

No. 10,037.

Appeal of PORTLAND CREMATION ASSOCIATION, Portland, Oregon.

STIPULATION OF FACTS.

It is stipulated as follows by the petitioner and the respondent:

1. The petitioner is a corporation for profit organized under the general corporation laws of Oregon. By its charter its duration is perpetual. Its powers are set out as follows in its charter:

> "The enterprise, business, pursuit and occupation in which this corporation proposes to engage is that of building, constructing, maintaining and operating crematories and columbaria and conducting the business of incinerating human remains, the burial and perpetual care of the ashes resulting therefrom; and, in connection therewith, to establish, maintain and conduct the business of funeral directors and undertakers. Said corporation shall also have power to issue, sell and dispose of certificates entitling the holder thereof to one cremation. And for any and all of such purposes, said corporation shall have power to acquire and take, by purchase, lease, donation, devise, or otherwise, the necessary land, real estate, or personal property. And said corporation, for any of its said corporate purposes,

shall have power to borrow money and to issue therefor its promissory notes."

[29] 2. The petitioner during all of the years 1919, 1920, 1921 and 1922, was engaged in the business of operating a crematorium in the city of Portland, Oregon, for the incineration of human remains and owning and operating a building in which were niches for the repository of urns containing the ashes of incinerated human bodies and vaults for the burial of the dead.

3. During all of said years petitioner sold niches and vaults for the aforesaid purposes and gave to purchasers deeds covering such niches and vault spaces, such deeds being in the form of the drafts of deed attached hereto marked respectively Exhibit 1 and Exhibit 2; Exhibit 1 covering niches and Exhibit 2 covering vaults.

4. During all of said years petitioner placed in a permanent maintenance fund 20 per centum of the gross selling price of all urns, niches and vaults sold by it, the amounts placed in said fund for each of said years being as follows:

1919	$12,827.16
1920	17,906.20
1921	17,076.73
1922	17,558.03

5. At a meeting of the directors held on March 4, 1913, the following resolution was adopted:

[30] "On motion it was ordered by the board that ten per cent of all receipts for sale of niches and vaults be set apart as and for a maintenance fund."

6. On December 1, 1918, the present stockholders acquired all of the stock of the petitioner, but from and after that date until March 3, 1920, there was no legally constituted Board of Directors and no legally elected officers, but E. M. Welch, Olive Jones, and George W. Baldwin acted as the board of directors and officers of petitioner.

7. No formal meeting of the stockholders was held from prior to December 1, 1918, until December 11, 1919, upon which latter date a meeting was held. A copy of the minutes of said meeting is attached hereto as Exhibit 3.

8. No formal meeting of the directors was held from prior to December 1, 1918, until March 3, 1920, at which date a meeting was held. A copy of the minutes of said meeting is attached hereto as Exhibit 4.

9. The said deductions of 20 per centum of the gross selling price of urns, niches and vaults for the maintenance fund mentioned in pargraph 4 hereof were made in 1919 pursuant to informal agreement of the acting board of directors and officers and confirmed by the stockholders and directors at the said meetings mentioned in paragraphs 7 and 8 of this stipulation. In 1920, 1921 and 1922, all additions to the maintenance fund were [31] made pursuant to and under authority of the said resolutions.

10. The income from said fund has been at all times used for the maintenance and upkeep of the property so sold, but always through the regular income and expense accounts of the corporation.

In other words, the income from the maintenance fund was mingled with other income of the petitioner and was expended for maintenance along with other funds of petitioner. The income from the maintenance fund was for each of the years in question credited directly to the profit and loss account of the corporation.

11. The deeds referred to as Exhibits 1 and 2 do not contain any reference to the maintenance fund, but all sales were made with the representation to the purchaser that the covenant to maintain the property was backed by a permanent maintenance fund and that a portion of the purchase price paid by such purchaser would be placed in the maintenance fund. It was also represented to each purchaser that the maintenance fund could not and would not be used for any other purpose. No specific representation was made as to the handling and control of the funds unless the purchaser made specific inquiry, in which event he was informed that the handling and control were with the petitioner.

12. The maintenance and upkeep of the property during each of the years in question required more money than the income [32] from the maintenance fund. The deficiency was supplied from the income of the petitioner and not from the principal of the maintenance fund.

13. On its books of account the petitioner reported as gross sales the amount received from purchasers of urns, niches and vaults less 20% thereof which was placed in the maintenance fund,

and which did not appear as a part of the items "gross sales."

14. Prior to November 3, 1920, there was no separate investment account maintained in the petitioner's books for the maintenance fund, but the amounts in said investment fund were in part mingled with other assets of the petitioner. On November 3, 1920, the petitioner invested $29,-816.51 in United States Liberty Loan Bonds, and these bonds were carried in an account entitled "Investment—Reserve for Maintenance—(Liberty Bonds, W. S. S., etc.)" There were no changes in this account to December 31, 1920, at which time it showed a balance of $29,816.51. Additions to the investment account representing Liberty Bonds and War Savings Stamps were made during 1921, the balance of the account at December 31, 1921, being $35,548.09, all of which was invested in Liberty Bonds and War Savings Stamps. In 1922 there were added to the account items of Liberty Bonds, corporate stocks, War Savings Stamps, and cash, and there was likewise a withdrawal of Liberty Bonds, which left a balance in the account at December 31, 1922, of $65,348.12, included in which was a loan of $20,000.00 made by the maintenance fund to the petitioner corporation, which loan was used by petitioner for its corporate purposes.

[32] 15. The petitioner declared no dividends during the years 1919, 1920, 1921 and 1922.

CHARLES E. McCULLOCH,
Attorney for Petitioner.

A. W. GREGG,
Attorney for Commissioner of Internal Revenue.
Per S. S. FAULKNER,
Special Attorney.

[34] EXHIBIT No. 1.

KNOW ALL MEN BY THESE PRESENTS, that Portland Cremation Association, a corporation, of Portland, Oregon, grantor, in consideration of ..... Dollars ($....) to it paid by ....., grantee, the receipt of which is hereby acknowledged, has bargained and sold and does hereby grant and convey to said grantee the perpetual and exclusive right to use for the deposit and repose of incinerated human remains, niche numbered ...., of tier, ... of section ...., of .... Chamber, in the Columbarium of Portland Cremation Association situate in the City of Portland, in the State of Oregon, which right to use said niche is subject, however, to such reasonable rules and regulations as now are or may hereafter be prescribed or adopted by said Association for the care and control of said Columbarium, which care and control shall at all times rest exclusively in said Association.

And said grantor does hereby covenant to and with said grantee and .... heirs to maintain said Columbarium forever; provided, that if said Asso-

ciation shall abandon its present Columbarium or the part thereof including the above described niche and provide new niches to take the place of those so abandoned, which said Association reserves the right to do, the said grantee or .... heirs shall then be entitled to another niche of like price and to select the same from such thereof as may be unsold of such new niches for the use aforesaid, in lieu of the one hereinbefore described, subject to said rules and regulations. The prices of such new niches to be fixed by said Association. Provided further; that if the said grantee or .... heirs shall fail to make such selection of such new niche within ninety days after the abandonment above mentioned, said Association is authorized and hereby reserves the right to make such selection of such new niche for said grantee or .... heirs, and when such selection shall be so made it shall be binding upon all parties hereto or interested in any of said niches.

Said Columbarium shall be open daily from 9 A. M. to 5 P. M. and said grantee and .... heirs shall, between said hours and subject to the rules and regulations aforesaid, be admitted thereto for the purpose of visiting said niche.

It is hereby further agreed that said grantee shall and will designate in writing delivered to said Association the names of those whose incinerated remains may be deposited in said niche and no other shall be placed therein.

IN WITNESS WHEREOF, said grantor has caused its corporate name and seal to be hereunto

signed and set at Portland, Oregon, by its President and Secretary this .... day of ....., 19...

PORTLAND CREMATION ASSOCIATION,

By .....,
President.

By .....,
Secretary.

No. 2401.

[35] EXHIBIT No. 2.

KNOW ALL MEN BY THESE PRESENTS, that Portland Cremation Association, a Corporation of Portland, Oregon, grantor, in consideration of .... Dollars ($....), to it paid, by ....., grantee, has bargained and sold and does hereby grant and convey unto said grantee the perpetual and exclusive right to use for the deposit and repose of human, remains vault No. .... of Tier .... in Section ...., Vault Rooms of said Association, in the City of Portland, Oregon, subject to such reasonable rules and regulations as now are and as may hereafter be prescribed or adopted by said Association, for the care and control of said rooms and the vaults therein. Which care and control shall at all times be and rest exclusively in said Association.

Said grantor hereby covenants with said grantee to maintain said vault forever; Provided, that if said Association shall abandon its vaults now in use and erect new vaults to take the place of those now in use, which said Association hereby reserves

the right to do, the said grantee or .... heirs shall then be entitled to another vault of like price and to select the same from such thereof as may be unsold of such new vaults, for the use aforesaid, in lieu of the one hereinbefore described, subject to the said rules and regulations. The prices of such new vaults to be fixed by said Association. Provided Further, that if the said grantee and .... heirs shall fail to make such selection of such new vault within ninety days after such abandonment by this Association of the vaults now in use, this Association is authorized and hereby reserves the right to make such selection for said grantee, and when such selection is so made it shall be binding upon all parties hereto or interested in any of said vaults.

Said vault room shall be opened daily from 9 o'clock A. M. to 5 P. M., and when so open the grantee and .... heirs shall upon application be admitted thereto for the purpose of visiting said vault, subject to said rules and regulations.

It is also hereby agreed that said grantee may by writing delivered to said Association, designate the names of those whose remains may be placed in said vault and thereafter no other remains shall be placed therein.

IN WITNESS WHEREOF, said Association has caused its corporate name and seal to be here-

unto signed and set by its President and Secretary, this .... day of ....., A. D. 192.....

PORTLAND CREMATION ASSOCIATION,

By ....., President.

By ....., Secretary.

No. 776.

[36] EXHIBIT No. 3.

STOCKHOLDERS' MEETING

of

PORTLAND CREMATION ASSOCIATION.

A meeting of the stockholders of the Portland Cremation Association was held at #511 Corbett Bldg., Portland, Oregon, on Thursday the 11th day of December, 1919, at the hour of 10:00 o'clock A. M., there being present the following stockholders and representing the number of shares of stock, as follows:

E. M. Welch	364 Shares
W. M. Welch, by E. M. Welch, proxy	92 Shares
C. R. Welch by E. M. Welch, proxy	92 Shares
George W. Baldwin	92 Shares
Olive Jones	1 Share
	641

All of the capital stock of said corporation being represented at said meeting excepting one share

of stock outstanding on the stock books of said corporation in the name of Lenora Hogue, but whose address is unknown, said meeting being held by consent of all of said stockholders above named excepting the said Lenora Hogue.

E. M. Welch acted as chairman of said meeting and Olive Jones acted as secretary, whereupon the chairman announced that there was a vacancy in the entire Board of Directors of said corporation by reason of the fact that all [37] of the former directors had ceased to be stockholders of the corporation and were therefore ineligible to act further as directors. Whereupon the chairman announced that nominations were in order for the election of a board of five directors, whereupon the following named persons were unanimously elected as directors of the corporation to serve until the next regular annual meeting or until their successors are elected and qualified:

E. M. Welch, George W. Baldwin, Olive Jones, W. M. Welch and C. R. Welch.

Whereupon E. M. Welch announced that for a number of months prior to said meeting he had acted as president of the corporation without any legal authority therefor, and that Olive Jones had acted as secretary of the corporation without any authority therefor and that himself and Olive Jones had in the conduct, management and operation of said business been compelled to execute certain legal documents for and on behalf of said corporation and had signed said documents as president and secretary of said corporation and in par-

ticular two deeds were executed as and for the deeds of said corporation, one of which was executed in favor of the Portland Railway, Light & Power Company and another deed executed in favor of John Clark Estate, and that the execution and delivery of those deeds was essential to the business of said corporation and for the best interest of said corporation; whereupon George [38] W. Baldwin introduced the following resolution, which was unanimously adopted:

> "RESOLVED that the stockholders of this corporation ratify and confirm all acts of E. M. Welch, as President of this corporation, and Olive Jones, as Secretary of the corporation, since the 1st day of December, 1919; and,
>
> BE IT FURTHER RESOLVED that the stockholders at this meeting request that the Board of Directors of this corporation pass a resolution further ratifying and confirming all acts of the said E. M. Welch, as President, and Olive Jones, as Secretary of the corporation, and more particularly ratifying and confirming the execution and delivery of the deeds heretofore issued to the Portland Railway, Light & Power Company and to the John Clark Estate."

The following resolution was then introduced and unanimously adopted:

> "WHEREAS, at a meeting of the Board of Directors of this corporation, held on the 4th day of March, 1913, a resolution was adopted authorizing and directing that ten per cent. of

all receipts for niches, urns and vaults be set aside as a maintenance fund; and,

WHEREAS, ten percent. of said receipts is not sufficient for said maintenance fund:

NOW, THEREFORE, be it resolved that the stockholders recommend to the Board of Directors that from and after January 1, 1919, twenty per cent. of the receipts from the sale of niches, urns and vaults be paid and set aside to the maintenance fund of this corporation."

There being no further business the meeting was, upon motion adjourned.

OLIVE JONES,
Secretary.

E. M. WELCH,
President.

[39] EXHIBIT No. 4.

MEETING OF BOARD OF DIRECTORS
of
PORTLAND CREMATION ASSOCIATION.

A meeting of the Board of Directors of the Portland Cremation Association was held at 511 Corbett Bldg., Portland, Oregon, on the 3rd day of March, 1920, at the hour of 10:00 o'clock A. M., there being present E. M. Welch, George W. Baldwin and Olive Jones, a majority of the Board of Directors of said corporation, Directors W. M. Welch and C. R. Welch having filed with the secretary of the cor-

poration their consent to said meeting and a waiver of notice regarding same, whereupon the following business was transacted:

E. M. Welch presided as the chairman of said meeting and Olive Jones acted as secretary. Whereupon the chairman announced that it was necessary to elect officers of said corporation for the ensuing year or until their successors are elected and qualified, whereupon the following directors were elected as officers of the corporation:

E. M. WELCH,
President.
GEORGE W. BALDWIN,
Vice-President.

[40] Whereupon the chairman announced that the next order of business was the appointment of the following officers, to wit:—Secretary, treasurer and superintendent.

Whereupon Olive Jones was appointed as secretary and treasurer of the corporation to hold office during the pleasure of the Board of Directors, and George W. Baldwin was appointed as superintendent of the corporation to hold office during the pleasure of the Board of Directors.

Whereupon E. M. Welch stated that he had acted as president of the corporation since December 1st, 1918, without any legal authority therefor, and that Olive Jones had acted as secretary of said corporation without any legal authority therefor and that in connection with their acts as president and secretary respectively, of said corporation, that they had had to execute certain conveyances and

other documents, all of which were for the benefit of said corporation and that in the transaction of said business for said corporation they had executed two deeds, one to the Portland Railway Light & Power Company, and another deed to the John Clark Estate, and that the stockholders at a meeting held December 11th, 1919, had ratified and confirmed the acts of himself and Olive Jones with the request that the Board of Directors of said corporation further ratify and confirm said acts, [41] whereupon George W. Baldwin presented the following resolution and moved its adoption:

> "RESOLVED, That all acts done by E. M. Welch acting as president of this corporation, and Olive Jones acting as secretary of this corporation since the 1st day of December, 1918, be in all things ratified, confirmed and approved, and
>
> "Be It Further Resolved, That should any other conveyances or acquittances be required in order to ratify or confirm any acts heretofore completed by the said E. M. Welch acting as president and Olive Jones acting as secretary that the president and secretary of this corporation be and they are hereby authorized and directed to execute any deeds, acquittances or other documents to fully carry out the ratification or confirmation of said acts."

Said motion was seconded and the same was unanimously carried.

Whereupon E. M. Welch announced that since May 1st, 1919, certain repairs and improvements had been made upon the property belonging to the corporation and in said repairs and improvements a new mausoleum was under course of construction and that the work was not yet completed but that it would cost approximately $50,000.00 to complete the improvements which have been under course of construction since May 1st, 1919, but that it was to the best advantage of said corporation that said improvements be completed in order that the revenue and earning capacity of the corporation be increased, but that no authorization had been made by the [42] Board of Directors regarding the expenditure of said sum of money and that he desired that the Board of Directors authorize the expenditure of said sum of money. Whereupon George W. Baldwin introduced the following resolution:

> "RESOLVED, That the Board of Directors be and they are hereby authorized to expend not to exceed the sum of $50,000.00 in making betterments and improvements and including the erection of a mausoleum upon the property of this corporation, and
>
> "Be It Further Resolved, That the president and superintendent of this corporation be and they are hereby authorized and directed to draw checks in payment of all bills incurred for said expenditures.
>
> "And Be It Further Resolved, That all acts taken by the said E. M. Welch prior to this date regarding the repairs, betterments and im-

provements and all expenditures thereon be and they are hereby in all things ratified and confirmed."

Whereupon said motion was seconded, the same put and unanimously carried.

Whereupon George W. Baldwin announced that the by-laws of the corporation were obsolete, and he thereupon submitted the following by-laws and moved their adoption.

[43] BY-LAWS

of

PORTLAND CREMATION ASSOCIATION.

I.

A meeting of the stockholders of this corporation for the election of directors and for the transaction of other legitimate business shall be held annually at the hour of three o'clock P. M., on the first Monday in January each year, commencing with the year 1921, at the office of the corporation.

Written notice of the time and place of holding such meeting shall be sent to each stockholder by mail or telegraph, or delivered to him in person, at least ten (10) days prior to the time fixed for holding the same.

Each stockholder shall file in writing with the secretary his postoffice address.

II.

A special meeting of the stockholders of this corporation may be held upon the call of the board of

directors, or the secretary of the corporation shall give notice of such meeting upon the written request of any number of stockholders representing not less than one-third of all the subscribed stock in this corporation. In either case, two days' notice shall be given in the manner provided for the annual meeting of the stockholders, and said notice shall state the purpose for which the meeting is called: PROVIDED, however, that any [44] and all of the stockholders may by letter or telegraphic message waive the giving of notice of any and all special or regular meetings of the stockholders.

III.

Any stockholders may vote by proxy, but such proxy shall be appointed by telegraph or by a writing subscribed by each stockholder and filed with the secretary at or before the time the vote is tendered; such proxy may be for any particular meeting or for all meetings until revoked.

IV.

When a majority of the stock is represented at a meeting of the stockholders, such meeting shall have power to transact any business that may properly come before it, but in case less than a majority of the stock is represented, the meeting shall have no power to transact business, except to adjourn to some other day.

V.

No notice shall be necessary for the holding of any adjourned meeting of the stockholders or directors.

VI.

The board of directors of this corporation shall consist of five members. Each director shall be a stockholder of the corporation, and in case a director shall cease to be a stockholder, he shall likewise cease to be a director.

[45] A majority of the directors shall constitute a quorum for the transaction of business at any and all meetings of the directors.

A vacancy in said board of directors shall be filled by the remaining directors, and the director so elected shall hold office until the next annual meeting or until his successor is elected and qualified.

VII.

The officers of this corporation shall be a president, a vice-president, a secretary, a treasurer and a superintendent.

One person may hold more than one office if in the judgment of the board of directors it is advisable so to do, and a director may hold one or more offices together with that of director.

VIII.

At the first meeting of the board of directors after their election, they shall elect from among their own number a president and vice-president, who shall hold office until the next annual meeting of the stockholders and until their successors are elected and have qualified.

IX.

At the first meeting of the board of directors after their election, they shall also appoint a secre-

tary, a treasurer and a superintendent, who shall hold office during the pleasure of the directors.

X.

[46] The president shall preside at all meetings of the stockholders and directors and shall be the inspector of all elections of directors, and certify who are elected. He shall also act as inspector of the voting on any other matter or resolution unless the meeting appoint special inspectors for such purpose. He shall sign, on behalf of the corporation, all deeds, contracts and promissory notes, except when otherwise expressly directed by the board of directors, and shall have a general supervision over all the property, business and interests of the corporation, as well as over all its officers, employees and agents.

XI.

In the absence of the president, his disqualification or inability to act, the vice-president shall possess the powers and discharge the duties of the president.

XII.

Should the president or vice-president resign, become disqualified, or be removed, the vacancy so created shall be filled by the board of directors.

XIII.

The secretary shall keep a fair and correct record of all the meetings of the stockholders and directors and other official business of the corporation. He shall prepare and submit at every meeting of the stockholders a certified list of all of the stockholders of the corporation, [47] and of those entitled to

vote at such meeting, and such list shall be *prima facie* evidence of the right to vote. He shall also produce the stock-book whenever required so to do by any stockholder. He shall have the custody of the corporate seal and it shall be his duty to affix the same to all deeds, contracts, or other documents executed by the corporation, and attest such deeds, leases or documents; but he shall not affix said seal to any instrument, except stock certificates, cremation certificates and certified copies, unless previously authorized so to do by a resolution of the board of directors or stockholders. He shall also give notice of meetings to the stockholders and directors, and perform such other duties as may be required of him by the board of directors.

XIV.

The treasurer shall have charge of all the moneys and securities for money and other assets of the corporation. He shall keep a correct and full account of all moneys received and disbursed by him as such treasurer, and of all securities and other assets received or delivered by him, in books belonging to the corporation. He shall deposit all moneys coming into his hands, that are not required for the immediate current purpose of the corporation, in the name of the corporation with such bank or banks as shall be designated by the board of directors. He shall render to the board of directors at the regular monthly meetings thereof, or at any other time that they [48] or the president of this corporation may require it, an account of all his transactions as treasurer and of the financial condition

of the corporation, and at the regular annual meeting of the stockholders of the corporation he shall make a like report for the preceding year. He shall only disburse the funds of the corporation as may be directed or ordered by the board of directors, taking proper vouchers, receipts and acquittances therefor. He shall also perform such other duties as the board of directors may from time to time direct.

XV.

All checks, drafts, or orders for the payment of money, shall be signed by the president or vice-president, and countersigned by the secretary, and by no one else unless authorized by the board of directors. All warrants on the treasurer for the payment of money shall be signed by the secretary and countersigned by the president or vice-president.

XVI.

The superintendent shall have, subject to the president and board of directors, general charge and supervision of the business of the company, and of its employees, whom he may appoint and discharge at his pleasure and discretion; but notice of all such appointments or discharges shall be forthwith given to the president, who shall have power to [49] suspend action on any appointment or discharge until the next meeting of the board of directors, when the matter shall be presented to the board to take action thereon. He shall cause correct and necessary books of account to be kept of all business transacted by the corporation. He

shall, at each monthly meeting of the directors, submit a statement in writing of the business of said corporation for the previous month, embracing in detail all matters of collections and expenditures, and all purchases made by the corporation. He shall submit a report of the business of the corporation at the annual meeting of the stockholders in each year, which report shall be an exact statement in detail of the business of the corporation for the preceding year, embracing all details connected therewith, and shall also show the gain or loss for such year. He shall not have power to sign the name of the corporation to any bill of exchange, promissory note or other evidence of indebtedness, nor to incur any indebtedness in its name or for its account, nor pledge its property, nor its credit as security for any other corporation or person; and he shall perform such other duties incident to the duties of superintendent as the board may from time to time direct.

XVII.

The board of directors may require any of its officers to give bonds in such amount as they may deem best, with [50] security to be approved by the board, conditioned for the faithful and honest discharge of the duties of the officer giving such bond.

XVIII.

The salaries of all officers shall be fixed by the board of directors, and those of all employees and agents shall be fixed by the superintendent, subject to the approval of said board of directors. No of-

ficer or director of the corporation shall be entitled to any salary or other compensation for any services rendered the corporation, except when fixed and authorized or approved by resolution of the board of directors.

XIX.

A special meeting of the board of directors shall be called by the secretary whenever he is requested to do so by the president or by a majority of the directors, by giving notice in writing, either personally to each director, or by mailing such notice to his address. This notice shall be given at least twenty-four hours prior to the holding of such special meeting: PROVIDED, that it shall not be necessary to notify any director who may be out of the state, and that a meeting may be held at any time all of the directors are present; and, PROVIDED [51] FURTHER, that any of the directors may by letter or telegraph message, waive the giving to them of notice of any or all special or regular meetings of the board of directors.

XX.

The shares of the capital stock of this corporation shall be represented by stock certificates signed by the president and attested by the secretary under the corporate seal of the corporation.

XXI.

The shares of the capital stock in this corporation are transferable only on the books of the corporation by the holder thereof in person, or by attorney,

upon surrender of the certificate issued therefor, properly endorsed.

XXII.

The earnings of this corporation shall be transferred only on its books, according to the order of the board of directors made at regular or special meetings, and no dividends shall be paid to stockholders, or other disposition of earnings made, except upon the order of the board of directors.

XXIII.

No deed, instrument, or contract of any description, purporting to be made on behalf of the corporation, shall be valid unless authorized by the board of directors, and [52] no instrument shall be deemed to have been duly executed on behalf of the corporation unless it shall be sealed with the corporate seal, signed by the president or by the secretary.

XXIV.

The seal heretofore adopted and used by this corporation is hereby formally adopted as the seal of this corporation, an impression thereof being as follows:

XXV.

These by-laws may be changed or amended at any regular or special meeting of the board of directors of the corporation by a vote of a majority of the directors.

[53] After a full discussion by the Board of Directors, said motion to adopt said by-laws was seconded, and the same was unanimously adopted.

The following resolution was introduced and unanimously adopted:

"RESOLVED that the salaries for the president of said corporation and for the Superintendent of said corporation, during the entire year of 1919, be fixed at $400.00 per month, payable monthly."

The following resolution was introduced and unanimously adopted:

"WHEREAS, at a meeting of the stockholders of this corporation, held December 11, 1919, the following resolution was unanimously adopted:

'WHEREAS, at a meeting of the Board of Directors of this corporation, held on the 4th day of March, 1913, a resolution was adopted authorizing and directing that ten per cent of all receipts for niches, urns and vaults be set aside as a maintenance fund; and,

WHEREAS, ten percent. of said receipts is not sufficient for said maintenance fund;

NOW, THEREFORE, be it resolved that the stockholders recommend to the Board of Directors that from and after January 1, 1919, twenty percent. of the receipts from the sale of niches, urns and vaults be paid and set aside to the maintenance fund of this corporation.'

and,

WHEREAS, twenty percent. of the maintenance fund has been set aside in accordance with said resolution from January 1, 1919;

NOW, THEREFORE, be it resolved that

from and after the 1st day of January, 1919, twenty percent. of all receipts from the sale of niches, urns and vaults be and the same is hereby set aside to the maintenance fund of this corporation."

There being no further business, the meeting was, upon motion, adjourned.

[Seal] OLIVE JONES,
Secretary.

E. M. WELCH,
Chairman.

Now, December 7, 1928, the foregoing stipulation of facts certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[54] A true copy.

[Seal] Teste: B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

DOCKET Nos. 10037, 22158, 23912.

United States Board of Tax Appeals.

Promulgated January 20, 1928.

PORTLAND CREMATION ASSOCIATION,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Amount set aside by petitioner for perpetual care of niches, urns, and vaults *held* to be within gross income.

CHARLES E. McCULLOCH, Esq., for the Petitioner.

SHELBY S. FAULKNOR, Esq., for the Respondent.

Deficiencies in income taxes have been determined for the years 1919, 1920, 1921, and 1922, in the respective amounts of $5,764.69, $4,402.68, $4,519.65, and $2,192.25. The facts were stipulated.

FINDINGS OF FACT.

Petitioner was organized under the laws of the State of Oregon, for the purpose of the construction, maintenance and operation of crematories and columbaria and the conducting of the business of incinerating human remains and the burial and perpetual care of the ashes resulting therefrom, and of conducting the business of funeral director and undertaker. During the years 1919 to 1922, inclusive, petitioner was engaged in the business of operating a crematorium in the City of Portland, Oregon, for the incineration of human remains and owning and operating a building in which were niches for the repository of urns containing the ashes of incinerated human bodies and vaults for the burial of the dead.

[55] During the said years petitioner sold niches and vaults for the aforesaid purposes and gave to purchasers deeds covering such niches and vault spaces. The deeds given to purchasers of vaults and niches were identical in form except as to the description of the particular niche or vault con-

veyed, and contained a covenant running to the grantee and his heirs that the petitioner would maintain the columbarium containing said niche or the vault forever.

At a meeting of the directors held on March 4, 1913, the following resolution was adopted:

> On motion it was ordered by the board that ten per cent of all receipts for sale of niches and vaults be set apart as and for a maintenance fund.

On December 1, 1918, the present stockholders acquired all of the stock of petitioner, but from and after that date until March 3, 1920, there was no legally constituted board of directors and there were no legally elected officers, but E. M. Welch, Olive Jones and George W. Baldwin acted as directors and officers of the petitioner. No formal meeting of the stockholders was held from the date of their purchase of the stock until December 11, 1919, at which time the stockholders met and adopted a resolution ratifying and confirming all acts after December 1, 1918, of E. M. Welch, as president, and Olive Jones, as secretary of the corporation. At this meeting the stockholders also adopted a resolution recommending to the board of directors that from and after January 1, 1919, 20 per centum of the receipts from the sale of niches, urns and vaults be paid and set aside to the maintenance fund of the association, instead of the 10 per centum theretofore authorized to be set aside, [56] which 10 per cent, it was recited, was not sufficient for said maintenance fund.

On March 3, 1920, there was held a formal meeting of the directors who ratified, confirmed and approved all acts of E. M. Welch, as president, and Olive Jones, as secretary, during the period from December 1, 1918, to the date of the meeting. The directors adopted a set of by-laws which contained no reference to a maintenance fund. The directors adopted the following resolution to put into effect the recommendation of the stockholders that the maintenance fund be increased:

> WHEREAS, at a meeting of the stockholders of this corporation, held December 11, 1919, the following resolution was unanimously adopted:
>
> WHEREAS, at a meeting of the Board of Directors of this corporation held on the 4th day of March, 1913, a resolution was adopted authorizing and directing that ten per cent. of all receipts for niches, urns and vaults be set aside as a maintenance fund; and
>
> WHEREAS, ten per cent. of said receipts is not sufficient for said maintenance fund;
>
> NOW, THEREFORE, be it resolved that the stockholders recommend to the Board of Directors that from and after January 1, 1919, twenty per cent. of the receipts from the sale of niches, urns and vaults be paid and set aside to the maintenance fund of this corporation.

and

> WHEREAS, twenty per cent. of the maintenance fund has been set aside in accordance with said resolution from January 1, 1919;

NOW, THEREFORE, be it resolved that from and after the 1st day of January, 1919, twenty per cent. of all receipts from the sale of niches, urns and vaults be and the same is hereby set aside to the maintenance fund of this corporation.

During the years 1919, 1920, 1921, and 1922, petitioner placed in a permanent maintenance fund 20 per centum of the gross selling price of [57] all urns, niches and vaults sold by it, the amounts placed in such funds for each of the years being as follows:

Year	Amount
1919	$12,827.16
1920	17,906.20
1921	17,076.73
1922	17,538.03

The deductions of 20 per centum of the gross selling price of the urns, niches and vaults for the maintenance fund were made during 1919 pursuant to informal agreement of the acting board of directors and officers and confirmed by the stockholders and directors as hereinbefore set forth. During the years 1920, 1921, and 1922, all additions to the maintenance fund were made pursuant to and under authority of the above mentioned resolutions. All sales by the petitioner were made with the representation to the purchasers that the covenant to maintain the property was backed by a permanent maintenance fund and that a portion of the purchase price paid by said purchaser would be placed in the maintenance fund. It was also represented to each purchaser that the maintenance

fund could not and would not be used for any other purpose. No specific representation was made as to the handling and control of the fund unless the purchaser made specific inquiry, in which event he was informed that the handling and control were with the petitioner. The income from the maintenance fund has at all times been used for the maintenance and upkeep of the property sold, but always through the regular income and expense accounts of the corporation. The income from the maintenance fund was mingled with other income of petitioner and expended for maintenance along with other funds of petitioner. The income from the maintenance fund was for each of the years in question credited directly to the profit [58] and loss account of petitioner.

The maintenance and upkeep of the property during each of the years in question required more money than the income from the maintenance fund. The deficiency was supplied from the income of the petitioner and not from the principal of the maintenance fund. Prior to November 3, 1920, there was no separate investment account maintained in petitioner's books for the maintenance fund, but the amounts in said investment fund were in part mingled with other assets of the petitioner. On November 3, 1920, the petitioner invested $29,816.51 in United States Liberty Loan Bonds, and these bonds were carried in the account entitled "Investment-Reserve for Maintenance (Liberty Bonds, W. S. S., etc.)." There were no changes in this account to December 31, 1920, at which time it

showed a balance of $29,816.51. Additions to the investment account representing Liberty Bonds and War Savings Stamps were made during 1921, the balance in the account at December 31, 1921, being $35,548.09, all of which was invested in Liberty Bonds and War Savings Stamps. In 1922 there were added to the account items of Liberty Bonds, corporate stocks, War Savings Stamps and cash, and there was also a withdrawal of Liberty Bonds, which left a balance in the account at December 31, 1922, of $65,348.12, included in which was a loan of $20,000 made by the maintenance fund to the petitioner, which loan was used by the petitioner for its corporate purposes.

On its books of account the petitioner reported as gross sales the amounts received from the purchase of urns, niches and vaults less 20 per centum thereof which was placed in the maintenance fund and which did not appear as a part of the item "gross sales."

No dividends were declared by the petitioner during any of the years 1919 to 1922, inclusive.

[59] OPINION.

STERNHAGEN.—All the facts are stipulated, and thus the Board is limited precisely in the scope of its consideration. It is contended that a commercial cremation corporation, by voluntarily setting aside a reserve called a "maintenance fund" for the purpose of performing some of its ordinary contractual obligations the actual cost of which is not known, which fund is so free from outside con-

straint that the corporation may "borrow" from it at will and so far as appears may limit its amount at will, has created a trust, itself the trustee. It is not an express trust, so it must be implied. The implication seems to rest on the covenant in the deed, the resolution of the directors establishing the fund, and the salesmen's "representations to purchasers." But these constitute no more than a contractual obligation cognizable at common law and a means privately adopted by the corporation to fulfill it. We can find no ground upon which a court of equity would imply a trust or administer it. The decisions of the Board which proceed upon an express trust either written or oral or under a state law, are not controlling here, there being neither words of trust nor public command. And of course the powers of this Board are such that its holding does not establish the trust or estop the petitioner to deny it if a grantee were to seek to enforce a trust obligation in chancery, as in Bourland vs. Springdale Cemetery Assn., 158 Ill. 458, 42 N. E. 86. If it were a trust it would require consideration of section 219, but it does not appear whether the petitioner had regarded itself as required by that section to file a return as a trustee.

In our opinion, all of the amounts received by petitioner were within [60] its gross income, and there is no warrant for treating any part of it as a separately identified sum as if petitioner never received it. Of course such sum as it expends or incurs annually in the performance of its business functions, whether of maintenance or otherwise, is a proper deduction. See Springdale Cemetery

Assn., 3 B. T. A. 223; Mead Construction Co., 3 B. T. A. 438.

Reviewed by the Board.

Judgment will be entered on 15 days' notice, under Rule 50.

SMITH did not participate.

[61] ARUNDELL, Dissenting.—I cannot agree with the majority opinion, as I think that the question here involved has been settled by decisions of the Board in Metairie Cemetery Association vs. Commissioner, 4 B. T. A. 903 and Inglewood Park Cemetery Association vs. Commissioner, 6 B. T. A. 386. In the Metairie case contracts were issued to plot owners providing for perpetual care, but containing no provisions (except in a few cases) as to the use to which the purchase price of the plat was to be put. It was, however, orally represented to purchasers that the purchase price was to be held in trust, and after the taxable years such representation was declared of record by formal resolution of the association. The Board there held that the parol agreement was sufficient to create a valid trust. In the present case there is, in addition to the parol agreement, a formal resolution during the taxable years setting aside the amounts for perpetual care. In the Metairie case there was a state law providing that owners of burial plots may convey their plots back to the cemetery company to hold perpetually in trust. It does not appear from the findings of fact and opinion of

the Board that any plats were conveyed to the association and so it cannot be said that the state law had anything to do with the case. In the Inglewood case there was a state law containing mandatory provisions with respect to the use of perpetual care funds and that seems to be the only material distinction between that case and the one here under consideration. The presence of a state law forbidding the use of perpetual care funds for any other purpose may aid in establishing the fact of the existence of a trust, but no one will say that an equally valid trust may not be created by the acts of the parties.

The prevailing opinion refers to other "decisions of the Board which [62] proceed upon an express trust either written or oral." None of the decisions indicate whether they were predicated on the nature of the trust and they do not say whether as a matter of law the Board found the trust to be express or implied. In both the Metairie and Inglewood cases there were express covenants concerning perpetual care, but there was nothing, other than oral representations to purchasers, as to the fund to be held in trust. If an express trust can be gathered from oral representations in these cases, why does not the same rule apply here? But I do not think it necessary to decide in any of these cases whether the trust is express or implied; it is sufficient if either kind can be found. It has been often held that no technical language nor specific words are necessary to create a trust. As is said in Chicago Rwy. vs. Des Moines Rwy., 254 U. S. 196, 208:

> "It needs no particular form of words to create a trust, so there be reasonable certainty as to the property, the objects, and the beneficiaries. Colton vs. Colton, 127 U. S. 300, 310."

There is here no lack of certainty, as urged by the respondent. The representations to purchasers and the deeds given them establish the purpose to which the funds were to be put and who the beneficiaries were. The records of the corporation determine the amount of the fund.

The acts of the petitioner in representing to purchasers that it had a permanent maintenance fund, in covenanting for perpetual care, and in formally setting aside a specified portion of the amounts received, we think were sufficient to create an enforceable trust. In Holmes vs. Dowie, 148 Fed. 634, 638, it is said:

> "It is a well recognized principle of equity that where a person accepts money or property to be used by him for the benefit of some other person or persons, or for the advancement of some lawful enterprise, such money or property constitutes a trust fund."

[63] The prevailing opinion cites the decision in Springdale Cemetery Association, 3 B. T. A. 223. An essential difference between the cases is that in the Springdale case, it was found as a fact that:

> "The corporation's by-laws contained no provisions for appropriating any part of the receipts from the sale of lots as such perpetual

care fund, and no resolution to that effect was passed by the directors."

Nor does the case of Mead Construction Co., 3 B. T. A. 438, seem to be in point. There the sole question was whether a certain part of the amount due the taxpayer for paving work which was withheld by a minicipality was income to the taxpayer; there was no question of whether any part of the amount received by the taxpayer was exempt from tax.

LANSDON, TRUSSELL and LOVE concur in this dissent.

Now, December 7, 1928, the foregoing findings of fact and opinion certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[64] A true copy.

Teste: B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

United States Board of Tax Appeals, Washington.

DOCKET No. 10037.

PORTLAND CREMATION ASSOCIATION,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

JUDGMENT.

The respondent having filed a proposed judgment pursuant to the Board's report of January 20, 1928, in the above-entitled proceeding, 10 B. T. A. 65, and hearing thereon having been had after notice and no one appearing in opposition thereto, it is

ORDERED, ADJUDGED and DECIDED that there is a deficiency of $5,764.69 for 1919.

J. M. STERNHAGEN.
Member United States Board of Tax Appeals.

Entered: Apr. 19, 1928.

Now, December 7, 1928, the foregoing judgment certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[65] A true copy.

Teste: B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

United States Board of Tax Appeals, Washington.

DOCKET No. 22158.

PORTLAND CREMATION ASSOCIATION,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

JUDGMENT.

The respondent having filed a proposed judgment pursuant to the Board's report of January 20, 1928, in the above-entitled proceeding, 10 B. T. A. 65, and hearing thereon having been had after notice and no one appearing in opposition thereto, it is

ORDERED, ADJUDGED and DECIDED that there is a deficiency of $2,192.25 for 1922.

J. M. STERNHAGEN.
Member United States Board of Tax Appeals.

Entered: Apr. 19, 1928.

Now, December 7, 1928, the foregoing judgment certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[66] A true copy.

Teste: B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

United States Board of Tax Appeals, Washington.

DOCKET No. 23912.

PORTLAND CREMATION ASSOCIATION,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

JUDGMENT.

The respondent having filed a proposed judgment pursuant to the Board's report of January 20, 1928, in the above-entitled proceeding, 10 B. T. A. 65, and hearing thereon having been had after notice and no one appearing in opposition thereto, it is

ORDERED, ADJUDGED and DECIDED that there are deficiencies of $4,402.68 and $4,519.65 for 1920 and 1921, respectively.

J. M. STERNHAGEN.
Member United States Board of Tax Appeals.

Entered: Apr. 20, 1928.

Now, December 7, 1928, the foregoing judgment certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[67] Filed Oct. 19, 1928. United States Board of Tax Appeals.

Before the United States Board of Tax Appeals.

DOCKET No. 10037.

PORTLAND CREMATION ASSOCIATION,
a Corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

NOTICE OF FILING PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS.

To the Above-named Respondent, and to C. M. CHAREST, General Counsel, Bureau of Internal Revenue, His Attorney:

Notice is hereby given that Portland Cremation Association, the above-named petitioner, has filed with the United States Board of Tax Appeals a petition for the review of the decision and final order of redetermination of the United States Board of Tax Appeals rendered and entered on April 19, 1928, in the case of Portland Cremation Association, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket No. 10037.

Dated at Portland, Oregon, this 18th day of October, 1928.

PORTLAND CREMATION ASSOCIATION.

By CHARLES E. McCULLOCH and IVAN F. PHIPPS,

Its Attorneys.

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[68] Filed Oct. 18, 1928. United States Board of Tax Appeals.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ———.

October Term, 1928.

PORTLAND CREMATION ASSOCIATION, a Corporation,

Petitioner and Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent and Appellee.

PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Portland Cremation Association, pursuant to the provisions of Section 1001 of the Revenue Act of 1926, as amended by Section 603 of the Revenue Act of 1928, presents this, its petition, and respectfully prays for the review of the decision of the United States Board of Tax Appeals rendered and entered on the 19th day of April, 1928, in Docket No. 10037, approving a deficiency in the income and profits taxes of the petitioner for the calendar year 1919, in the [69] amount of $5,764.69, and in support of its petition for such review respectfully represents as follows:

I.

The Commissioner of Internal Revenue, by his

letter dated November 3, 1925, asserted a deficiency in petitioner's tax liability for the year 1919 in the sum of $5,764.69. By his letter of November 15, 1926, the Commissioner asserted a deficiency in petitioner's tax liability for 1922 in the sum of $2,192.25, and by his letter of January 18, 1927, the Commissioner asserted deficiencies in the petitioner's tax liability for the years 1920 and 1921 in the respective amounts of $4,402.68 and $4,519.65. Thereafter, and within the times prescribed by law, the petitioner filed with the United States Board of Tax Appeals its petitions requesting the redetermination of such deficiencies. The proceedings duly came on for hearing on April 18, 1927, at which time the three proceedings were consolidated for hearing. The proceedings were submitted to the Board upon a written stipulation of facts. No witnesses were called and no oral testimony was introduced. Thereafter, and on January 20, 1928, the United States Board of Tax Appeals made its findings of fact in substantial accordance with the facts alleged in the petitions and stipulated by the parties, and rendered its opinion approving the determination of the Commissioner. The said findings and opinion were reviewed by the [70] entire Board and upon such review four members thereof dissented. Thereafter, and on April 19, 1928, a final order of redetermination approving the deficiency asserted by the Commissioner for the year 1919 in the sum of $5,764.69 was duly rendered and entered by the United States Board of Tax Appeals, and likewise on April 19,

1928, there was rendered and entered a final order of redetermination approving the deficiency for 1922 in the sum of $2,192.25 (Docket No. 2158), and on April 20, 1928, a final order of redetermination was duly rendered and entered approving the asserted deficiencies for 1920 and 1921 in the respective amounts of $4,402.68 and $4,519.65. (Docket No. 23912.)

II.

STATEMENT OF THE NATURE OF THE CONTROVERSY.

This case involves income and profits taxes for the year 1919 and arises under the Revenue Act of 1918.

The controversy between appellant (petitioner before the Board of Tax Appeals and hereinafter referred to as the petitioner) and the Commissioner of Internal Revenue involves the single question whether the Commissioner properly included in petitioner's taxable income certain sums received by petitioner during the year 1919 from sales of vaults, urns and niches for the burial of the dead or within which to place the ashes resulting from the incineration of human remains, which [71] sums were set aside by petitioner and placed in a permanent maintenance fund which was to be used exclusively for the perpetual care and maintenance of the property so sold and which permanent maintenance fund was so used, or whether such sums so set aside and placed in the permanent maintenance fund constituted a trust fund for the benefit of purchasers of vaults, urns and niches.

The facts are not in dispute, having been stipulated in writing by the parties, and the sole question presented for decision in this proceeding is whether the facts so stipulated by the parties and found by the Board of Tax Appeals are sufficient in law to sustain the decision of the Board of Tax Appeals affirming the Commissioner's determination. A consideration of all of the facts so found by the United States Board of Tax Appeals, is necessarily involved in the review of the Board's decision.

III.

DESIGNATION OF COURT OF REVIEW.

Petitioner is a corporation with its principal place of business in the City of Portland, Oregon. It made its return of annual net income for the year 1919 to the Collector of Internal Revenue at Portland, Oregon. The petitioner, being aggrieved by the said decision and final order of the United States Board of Tax Appeals, seeks a review thereof in [72] accordance with the provisions of the Revenue Act of 1926, as amended by the Revenue Act of 1928, by the United States Circuit Court of Appeals for the Ninth Circuit, within which circuit is located the office of the Collector of Internal Revenue at Portland, Oregon.

IV.

ASSIGNMENTS OF ERROR.

The petitioner sets forth the following assignments of error:

1. That the United States Board of Tax Appeals erred in deciding and holding that those portions

of the amounts received by petitioner in 1919 from the sale of niches, urns and burial vaults, which were set apart for and in a fund for the permanent maintenance of such property, were properly included in petitioner's income for the year 1919.

2. That the decision and order of redetermination of the United States Board of Tax Appeals is in error in that the findings of fact made by said Board are insufficient to support the said decision and order of redetermination in that such findings show that the sum of $12,827.16 set aside by petitioner and placed in its permanent maintenance fund in the year 1919 did not inure to the benefit of petitioner but constituted a trust fund for the benefit of purchasers of niches, [73] urns and burial vaults.

3. That the United States Board of Tax Appeals erred in rendering its decision in favor of the respondent.

WHEREFORE, your petitioner prays that this Honorable Court may review said decision and final order of redetermination of the United States Board of Tax Appeals and reserve and set aside the same.

PORTLAND CREMATION ASSOCIATION.

By E. M. WELCH,
President.

CHARLES E. McCULLOCH, and
IVAN F. PHIPPS,
Attorneys for Petitioner and Appellant,
1410 Yeon Building, Portland, Oregon.

[74] State of Oregon,
County of Multnomah,—ss.

I, E. M. Welch, being first duly sworn, on oath say that I am president of Portland Cremation Association, the petitioner and appellant above named, and that as such officer am authorized to sign the foregoing petition for review; that I have read the said petition and know the contents thereof and the facts set forth therein are true as I verily believe; that the said petition is filed in good faith and not for purposes of delay.

E. M. WELCH.

Subscribed and sworn to before me this 10th day of October, 1928.

[Seal] DAVID L. DAVIES,
Notary Public for Oregon.

My commission expires Aug. 28, 1931.

Service of within petition and notice accepted this 18th day of October, 1928.

C. M. CHAREST,
General Counsel, Bureau of Int. Rev.

Now, December 7, 1928, the foregoing petition for review certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[75] Filed Oct. 19, 1928. United States Board of Tax Appeals.

Before the United States Board of Tax Appeals.

DOCKET No. 22158.

PORTLAND CREMATION ASSOCIATION, a Corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

NOTICE OF FILING PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS.

To the Above-named Respondent, and to C. M. CHAREST, General Counsel, Bureau of Internal Revenue, His Attorney:

Notice is hereby given that Portland Cremation Association, the above-named petitioner, has filed with the United States Board of Tax Appeals a petition for the review of the decision and final order of redetermination of the United States Board of Tax Appeals rendered and entered on April 19, 1928, in the case of Portland Cremation Association, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket No. 22158.

Dated at Portland, Oregon, this 18th day of October, 1928.

PORTLAND CREMATION ASSOCIATION.

By CHARLES E. McCULLOCH and IVAN F. PHIPPS,

Its Attorneys.

[76] In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

PORTLAND CREMATION ASSOCIATION, a Corporation,

Petitioner and Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent and Appellee.

PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS.

To the Honorable, the Judges of the United States Circuit Court of Appeals, for the Ninth Circuit:

Portland Cremation Association, pursuant to the provisions of Section 1001 of the Revenue Act of 1926, as amended by Section 603 of the Revenue Act of 1928, presents this, its petition, and respectfully prays for the review of the decision of the United States Board of Tax Appeals rendered and entered on the 19th day of April, 1928, in Docket No. 22158, approving a deficiency in the income and profits taxes of the petitioner for the calendar year 1922 in the amount of $2,192.25, and in support of its petition for such review respectfully represents as follows:

[77] I.

The Commissioner of Internal Revenue, by his letter dated November 3, 1925, asserted a deficiency in

petitioner's tax liability for the year 1919 in the sum of $5,764.69. By his letter of November 15, 1926, the Commissioner asserted a deficiency in petitioner's tax liability for 1922 in the sum of $2,192.25, and by his letter of January 18, 1927, the Commissioner asserted deficiencies in the petitioner's tax liability for the years 1920 and 1921 in the respective amounts of $4,402.68 and $4,519.65. Thereafter, and within the times prescribed by law, the petitioner filed with the United States Board of Tax Appeals its petitions requesting the redetermination of such deficiencies. The proceedings duly came on for hearing on April 18, 1927, at which time the three proceedings were consolidated for hearing. The proceedings were submitted to the Board upon a written stipulation of facts. No witnesses were called and no oral testimony was introduced. Thereafter, and on January 20, 1928, the United States Board of Tax Appeals made its findings of fact in substantial accordance with the facts alleged in the petitions and stipulated by the parties, and rendered its opinion approving the determination of the Commissioner. The said findings and opinion were reviewed by the entire Board and upon such review four members thereof dissented. Thereafter, and on April 19, 1928, a final order of redetermination approving the deficiency asserted by the Commissioner [78] for the year 1919 in the sum of $5,764.69 was duly rendered and entered by the United States Board of Tax Appeals, and likewise on April 19, 1928, there was rendered and entered a final order of redetermination approving

the deficiency for 1922 in the sum of $2,192.25 (Docket No 22158), and on April 20, 1928, a final order of redetermination was duly rendered and entered approving the asserted deficiencies for 1920 and 1921 in the respective amounts of $4,402.68 and $4,519.65. (Docket No. 23912.)

II.

STATEMENT OF THE NATURE OF THE CONTROVERSY.

This case involves income and profits taxes for the year 1922 and arises under the Revenue Act of 1921.

The controversy between appellant (petitioner before the Board of Tax Appeals and hereinafter referred to as the petitioner) and the Commissioner of Internal Revenue involves the single question whether the Commissioner properly included in petitioner's taxable income certain sums received by petitioner during the year 1922 from sales of vaults, urns and niches for the burial of the dead or within which to place the ashes resulting from the incineration of human remains, which sums were set aside by petitioner and placed in a permanent maintenance fund which was to be used exclusively for the perpetual care and maintenance of the property so sold and which permanent maintenance fund was so used, or whether such sums [79] so set aside and placed in the permanent maintenance fund constituted a trust fund for the benefit of purchasers of vaults, urns and niches.

The facts are not in dispute, having been stipulated in writing by the parties, and the sole question pre-

sented for decision in this proceeding is whether the facts so stipulated by the parties and found by the Board of Tax Appeals are sufficient in law to sustain the decision of the Board of Tax Appeals affirming the Commissioner's determination. A consideration of all of the facts so found by the United States Board of Tax Appeals, is necessarily involved in the review of the Board's decision.

III.

DESIGNATION OF COURT OF REVIEW.

Petitioner is a corporation with its principal place of business in the City of Portland, Oregon. It made its return of annual net income for the year 1922 to the Collector of Internal Revenue at Portland, Oregon. The petitioner, being aggrieved by the said decision and final order of the United States Board of Tax Appeals, seeks a review thereof in accordance with the provisions of the Revenue Act of 1926, as amended by the Revenue Act of 1928, by the United States Circuit Court of Appeals for the Ninth Circuit, within which circuit is located the office of the Collector of Internal Revenue at Portland, Oregon.

[80] IV.

ASSIGNMENTS OF ERROR.

The petitioner sets forth the following assignments of error

1. That the United States Board of Tax Appeals erred in deciding and holding that those portions of the amounts received by petitioner in 1922 from the sale of niches, urns and burial vaults, which

were set apart for and in a fund for the permanent maintenance of such property, were properly included in petitioner's income for the year 1922.

2. That the decision and order of redetermination of the United States Board of Tax Appeals is in error in that the findings of fact made by said Board are insufficient to support the said decision and order of redetermination in that such findings show that the sum of $17,538.03 set aside by petitioner and placed in its permanent maintenance fund in the year 1922 did not inure to the benefit of petitioner but constituted a trust fund for the benefit of purchasers of niches, urns and burial vaults.

3. That the United States Board of Tax Appeals erred in rendering its decision in favor of the respondent.

WHEREFORE, your petitioner prays that this Honorable Court may review said decision and final order of redetermination [81] of the United States Board of Tax Appeals and reverse and set aside the same.

PORTLAND CREMATION ASSOCIATION.

By E. M. WELCH,
President.

CHARLES E. McCULLOCH and
IVAN F. PHIPPS,
Attorneys for Petitioner and Appellant,
1410 Yeon Building, Portland, Oregon.

State of Oregon,
County of Multnomah,—ss.

I, E. M. Welch, being first duly sworn, on oath say that I am president of Portland Crema-

tion Association, the petitioner and appellant above named, and that as such officer am authorized to sign the foregoing petition for review; that I have read the said petition and know the contents thereof and the facts set forth therein are true as I verily believe; that the said petition is filed in good faith and not for purposes of delay.

E. M. WELCH.

Subscribed and sworn to before me this 10th day of October, 1928.

[Seal] DAVID L. DAVIES,
Notary Public for Oregon.

My commission expires Aug. 28, 1931.

Service of within petition and notice of filing accepted this 18th day of October, 1928.

C. M. CHAREST,
General Counsel Bureau of Int. Rev.

Now, December 7, 1928, the foregoing petition for review certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[82] Filed Oct. 18, 1928. United States Board of Tax Appeals.

Before the United States Board of Tax Appeals.

DOCKET No. 23912.

PORTLAND CREMATION ASSOCIATION, a Corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

NOTICE OF FILING PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS.

To the Above-named Respondent, and to C. M. CHAREST, General Counsel, Bureau of Internal Revenue, His Attorney:

Notice is hereby given that Portland Cremation Association, the above-named petitioner, has filed with the United States Board of Tax Appeals a petition for the review of the decision and final order of redetermination of the United States Board of Tax Appeals rendered and entered on April 20, 1928, in the case of Portland Cremation Association, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket No. 23912.

Dated at Portland, Oregon, this 18th day of October, 1928.

PORTLAND CREMATION ASSOCIATION.

By CHARLES E. McCULLOCH and IVAN F. PHIPPS,

Its Attorneys.

[83] In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

PORTLAND CREMATION ASSOCIATION, a Corporation,

Petitioner and Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent and Appellee.

PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS.

To the Honorable, the Judges of the United States Circuit Court of Appeals, for the Ninth Circuit:

Portland Cremation Association, pursuant to the provisions of Section 1001 of the Revenue Act of 1926, as amended by Section 603 of the Revenue Act of 1928, presents this, its petition, and respectfully prays for the review of the decision of the United States Board of Tax Appeals rendered and entered on the 20th day of April, 1928, in Docket No. 23912, approving a deficiency in the income and profits taxes of the petitioner for the calendar years 1920 and 1921, in the respective amounts of $4,402.68 and $4,519.65, and in support of its petition for such review respectfully represents as follows:

[84] I.

The Commissioner of Internal Revenue, by his letter dated January 18, 1927, asserted deficiencies in the petitioner's tax liability for the years 1920 and 1921 in the respective amounts of $4,402.68 and $4,519.65. Likewise by his letters of November 3, 1925, and November 15, 1926, he asserted deficiencies in petitioner's taxes for the years 1919 and 1922 in the respective amounts of $5,764.69 and $2,192.25. Thereafter, and within the times prescribed by law, the petitioner filed with the United States Board of Tax Appeals its petitions requesting the redetermination of such deficiencies. The proceedings duly came on for hearing on April 18, 1927, at which time the three proceedings were consolidated for hearing. The proceedings were submitted to the Board upon a written stipulation of facts. No witnesses were called and no oral testimony was introduced. Thereafter, and on January 20, 1928, the United States Board of Tax Appeals made its findings of fact in substantial accordance with the facts alleged in the petitions and stipulated by the parties, and rendered its opinion approving the determination of the Commissioner. The said findings and opinion were reviewed by the entire Board and upon such review four members thereof dissented. Thereafter, and on April 20, 1928, a final order of redetermination approving the deficiencies asserted by the Commissioner [85] for the years 1920 and 1921 in the respective amounts of $4,402.68 and $4,519.65 were duly rendered and entered by the United States

Board of Tax Appeals, and likewise there were rendered and entered on April 19, 1928, final decisions and orders of redetermination in Docket Nos. 10037 and 22158 approving the asserted deficiencies for 1919 and 1922 in the respective amounts of $5,764.69 and $2,192.25.

II.

STATEMENT OF THE NATURE OF THE CONTROVERSY.

This case involves income and profits taxes for the years 1920 and 1921 and arises under the Revenue Acts of 1918 and 1921.

The controversy between appellant (petitioner before the Board of Tax Appeals and hereinafter referred to as the petitioner) and the Commissioner of Internal Revenue involves the single question whether the Commissioner properly included in petitioner's taxable income certain sums received by petitioner during the years 1920 and 1921 from sales of vaults, urns and niches for the burial of the dead or within which to place the ashes resulting from the incineration of human remains, which sums were set aside by petitioner and placed in a permanent maintenance fund which was to be used exclusively for the perpetual care and maintenance of the property so sold and which permanent maintenance fund was so used, or whether such sums so set aside and placed in the permanent maintenance fund constituted a [86] trust fund for the benefit of purchasers of vaults, urns and niches.

The facts are not in dispute, having been stipulated

in writing by the parties, and the sole question presented for decision in this proceeding is whether the facts so stipulated by the parties and found by the Board of Tax Appeals are sufficient in law to sustain the decision of the Board of Tax Appeals affirming the Commissioner's determination. A consideration of all of the facts so found by the United States Board of Tax Appeals, is necessarily involved in the review of the Board's decision.

III.

DESIGNATION OF COURT OF REVIEW.

Petitioner is a corporation with its principal place of business in the City of Portland, Oregon. It made its return of annual net income for the years 1920 and 1921 to the Collector of Internal Revenue at Portland, Oregon. The petitioner, being aggrieved by the said decision and final order of the United States Board of Tax Appeals, seeks a review thereof in accordance with the provisions of the Revenue Act of 1962, as amended by the Revenue Act of 1928, by the United States Circuit Court of Appeals for the Ninth Circuit, within which circuit is located the office of the Collector of Internal Revenue at Portland, Oregon.

[87] IV.

ASSIGNMENTS OF ERROR.

The petitioner sets forth the following assignments of error:

1. That the United States Board of Tax Appeals erred in deciding and holding that those portions of the amounts received by petitioner in 1920 and 1921

from the sale of niches, urns and burial vaults, which were set apart for and in a fund for the permanent maintenance of such property, were properly included in petitioner's taxable income for the said years.

2. That the decision and order of redetermination of the United States Board of Tax Appeals is in error in that the findings of fact made by said Board are insufficient to support the said decision and order of redetermination in that such findings show that the sums of $17,906.20 and $17,538.03 set aside by petitioner and placed in its permanent maintenance fund in the years 1920 and 1921, respectively, did not inure to the benefit of petitioner but constituted a trust fund for the benefit of purchasers of niches, urns and burial vaults.

3. That the United States Board of Tax Appeals erred in rendering its decision in favor of the respondent.

WHEREFORE, your petitioner prays this Honorable Court may review said decision and final order of redetermination of the United States Board of Tax Appeals and reverse [88] and set aside the same.

PORTLAND CREMATION ASSOCIATION.

By E. M. WELCH,
President.

CHARLES E. McCULLOCH,
IVAN F. PHIPPS,
Attorneys for Petitioner and Appellant,
1410 Yeon Building, Portland, Oregon.

State of Oregon,
County of Multnomah,—ss.

I, E. M. Welch, being first duly sworn, on oath say that I am president of Portland Cremation Association, the petitioner and appellant above named, and that as such officer am authorized to sign the foregoing petition for review; that I have read the said petition and know the contents thereof and the facts set forth therein are true as I verily believe; that the said petition is filed in good faith and not for purposes of delay.

E. M. WELCH.

Subscribed and sworn to before me this 10th day of October, 1928.

[Seal] DAVID L. DAVIES,
Notary Public for Oregon.

My commission expires Aug. 28, 1931.

Service of within petition accepted this 18th day of October, 1928.

[Seal] C. M. CHAREST,
General Counsel, Bureau of Int. Rev.

Now, December 7, 1928, the foregoing petition for review certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[89] Filed Oct. 26, 1928. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 10,037.

PORTLAND CREMATION ASSOCIATION, a Corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the United States Board of Tax Appeals:

YOU WILL PLEASE prepare and, within sixty days from the date of the filing of the petition for review in the above-entitled proceeding, transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, certified copies of the following documents:

1. The docket entries of the proceedings before the United States Board of Tax Appeals in the above-entitled proceeding.

2. Pleadings before the Board.

3. Findings of fact, opinion and decision of the Board, including final order of redetermination dated April 19, 1928.

4. Petition for review and notice of filing thereof, with notation of acceptance of service of petition and notice of filing by counsel for respondent.

5. Stipulation of facts.

The foregoing to be prepared, certified, and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated October 25, 1928.

CHARLES E. McCULLOCH,
IVAN F. PHIPPS,
Counsel for Petitioner.

Now, December 7, 1928, the foregoing praecipe for record certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[90] Filed Oct. 26, 1928. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 22,158.

PORTLAND CREMATION ASSOCIATION, a Corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the United States Board of Tax Appeals:

YOU WILL PLEASE prepare and, within sixty days from the date of the filing of the petition for

review in the above-entitled proceeding, transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, certified copies of the following documents:

1. The docket entries of the proceedings before the United States Board of Tax Appeals in the above-entitled proceeding.

2. Pleadings before the Board.

3. Findings of fact, opinion and decision of the Board, including final order of redetermination dated April 19, 1928.

4. Petition for review and notice of filing thereof, with notation of acceptance of service of petition and notice of filing by counsel for respondent.

5. Stipulation of facts.

The foregoing to be prepared, certified, and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated October 25, 1928.

CHARLES E. McCULLOCH,
IVAN F. PHIPPS,
Counsel for Petitioner.

Now, December 7, 1928, the foregoing praecipe for record certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[91] Filed Oct. 26, 1928. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 23,912.

PORTLAND CREMATION ASSOCIATION, a Corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the United States Board of Tax Appeals:

YOU WILL PLEASE prepare, and, within sixty days from the date of the filing of the petition for review in the above-entitled proceeding, transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, certified copies of the following documents:

1. The docket entries of the proceedings before the United States Board of Tax Appeals in the above-entitled proceeding.

2. Pleadings before the Board.

3. Findings of fact, opinion and decision of the Board, including final order of redetermination dated April 20, 1928.

4. Petition for review and notice of filing thereof, with notation of acceptance of service of petition and notice of filing by counsel for respondent.

5. Stipulation of facts.

The foregoing to be prepared, certified, and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated October 25, 1928.

CHARLES E. McCULLOCH,
IVAN F. PHIPPS,
Counsel for Petitioner.

Now, December 7, 1928, the foregoing praecipe for record certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[Endorsed]: No. 5661. United States Circuit Court of Appeals for the Ninth Circuit. Portland Cremation Association, a Corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of Record. Upon Petitions to Review Orders of the United States Board of Tax Appeals.

Filed December 17, 1928.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

PORTLAND CREMATION ASSOCIATION, a Corporation,

Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellees.

STIPULATION RE PRINTING OF RECORD.

It is hereby stipulated and agreed by and between the parties hereto by their respective counsel of record that the three above-entitled causes (on petition for review of decisions of the United States Board of Tax Appeals) shall be consolidated for purposes of preparation and filing of briefs and for hearing and decision, and that the printed transcript of record in the said three causes so consolidated shall be prepared under one cover and shall contain the following:

1. Docket entries of proceedings before the United States Board of Tax Appeals in each of the three causes.
2. Separate petitions in each of the three causes.
3. Separate answers in each of the three causes.
4. Stipulation of facts in these causes is consolidated for hearing before the United States Board of Tax Appeals.
5. Findings of fact, opinion and decision of the Board.

6. Separate final orders of redetermination in each of the three causes.
7. Separate petitions for review and notices of the filing thereof in each of the three causes.
8. This stipulation.

CHARLES E. McCULLOCH,
IVAN F. PHIPPS,
CAREY & KERR,
Attorneys for Appellant.
C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,
Counsel for Appellee.

[Endorsed]: Stipulation. Filed Nov. 27, 1928. Paul P. O'Brien, Clerk.

Refiled Dec. 17, 1928. Paul P. O'Brien, Clerk.

No. 5661

In the

United States Circuit Court of Appeals

For the Ninth Circuit

PORTLAND CREMATION ASSOCIATION
Petitioner and Appellant

vs.

COMMISSIONER OF INTERNAL REVENUE
Respondent and Appellee

Upon Petitions to Review Orders of the United States Board of Tax Appeals

Brief of Petitioner and Appellant

CAREY & KERR
CHARLES E. McCULLOCH
IVAN F. PHIPPS
Attorneys for Petitioner and Appellant
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PORTLAND, OREGON

No. 5661

In the

United States Circuit Court of Appeals

For the Ninth Circuit

PORTLAND CREMATION ASSOCIATION
Petitioner and Appellant

vs.

COMMISSIONER OF INTERNAL REVENUE
Respondent and Appellee

Upon Petitions to Review Orders of the United States Board of Tax Appeals

Brief of Petitioner and Appellant

STATEMENT OF THE CASE

This is a proceeding pursuant to the provisions of Section 1001 of the Revenue Act of 1926 (44 Stat. 9) as amended by Section 603 of the Revenue Act of 1928, for the review of decisions of the United States Board of Tax Appeals in favor of the Commissioner of Internal Revenue and against the Portland Cremation Association, petitioner before the Board and appellant herein. There were three separate proceedings before the Board. They

were consolidated for hearing and decision. However, three separate judgment orders or orders of redetermination were entered by the Board and three separate petitions for review were filed in this Court. The three proceedings by stipulation of the parties have been consolidated for the purpose of preparation and filing of briefs and for hearing and decision by this Court.

These appeals involve a single question, whether the Commissioner of Internal Revenue properly added to appellant's taxable income certain amounts received by appellant in connection with the sale of vaults, urns and niches for the burial of the dead or within which to place the ashes resulting from the incineration of human remains, which amounts were placed in a permanent maintenance fund which was to be used and which was used exclusively for the maintenance of the property so sold.

There is no dispute as to the facts. They were stipulated in writing by the parties. The question presented for decision by this Court is whether the facts so stipulated and found by the Board of Tax Appeals are sufficient in law to sustain the Board's decision affirming the Commissioner's action in including the amounts placed in the permanent maintenance fund in appellant's taxable income.

The years involved in this appeal are the years 1919, 1920, 1921 and 1922. During each of these

years appellant placed in a permanent maintenance fund twenty per cent. of the gross receipts from sales of vaults, niches and urns, the aggregate amount for the four years being $65,348.12. Each sale of a vault or niche in appellant's mausoleum or columbarium was evidenced by a grant or conveyance of space in the form of a deed. Such deed contained a covenant to maintain the deeded property forever. For the most part the moneys representing this maintenance fund were invested in United States Liberty Bonds and War Savings Stamps. The income from the fund was mingled with income of the appellant and was used for the sole purpose of maintaining the property. During all of the years in question the income from the permanent maintenance fund was insufficient to maintain the property in good condition without the addition of funds belonging to appellant. No part of the principal of the permanent maintenance fund was ever used for the maintenance of the property. At the end of 1922 the permanent maintenance fund in the sum of $65,348.12 was intact. At the time of each sale of vaults, niches and urns, representations were made to the purchaser that the property would be maintained perpetually and that such maintenance was backed up or guaranteed by a permanent maintenance fund, that a portion of the amount paid by the purchaser would be placed in such permanent maintenance fund and

that said fund would be and could be used for no other purpose.

During the years in question no dividends were declared or paid. (Transcript of Record, pages 40 to 66, and pages 67 to 72.)

ARGUMENT

I.

The United States Board of Tax Appeals erred in deciding that those portions of the amounts received by appellant in the years 1919, 1920, 1921 and 1922 from the sale of niches, urns and burial vaults, which were set apart in a fund for the permanent maintenance of the property were properly included by the Commissioner in appellant's taxable income for said years.

It is apparent from the facts outlined above, which are clearly set forth in the written stipulation of facts and in the findings of fact made by the Board of Tax Appeals, that the moneys placed in the permanent maintenance fund did not inure to the benefit of the appellant as assets subject to disposition as appellant might see fit, but immediately became and at all times remained a trust fund for the benefit of the owners of vaults, urns and niches. Upon any intimation that the fund was

being improperly used or turned to purposes other than that for which it was created, namely, the perpetual care of the property, the appellant would have been subjected to the instant protest of indignant purchasers and immediate litigation to compel it to carry out the terms of the trust and use the funds in accordance with its understanding and agreement with the purchasers. We have no doubt that any court having jurisdiction, upon proof of the use of the permanent maintenance fund for any other purpose, would have entered its decree confirming the trust and taking from appellaant the control and custody of the fund itself.

It was not the purpose of the various Revenue Acts of the United States to tax as income moneys which under no circumstances could belong to or inure to the benefit of a taxpayer or be used for his private advantage. The doctrine has been repeatedly announced in debates in Congress and in decisions of the courts that the law seeks to tax only that which is in truth income and not that which is not income in fact, although perhaps having the appearance of income.

The history of the taxation of cemetery companies in connection with their permanent maintenance funds is interesting. In an excess of zeal the Commissioner of Internal Revenue from the very start sought to impose a tax upon all receipts of such companies and to include in such receipts

subject to tax all moneys placed in permanent maintenance funds whether such funds were subject to express trusts or to implied trusts, and whether the custody of such funds and of the income therefrom was in the hands of the cemetery companies or in the hands of independent trustees representing the individual owners of burial lots and vaults. Quite naturally the cemetery companies objected to the imposition of taxes on funds which did not and could not inure to their benefit but it was only after the creation of the United States Board of Tax Appeals that public decisions on this important question began to be made and the power and authority of the Commissioner to be abridged.

There have been six decisions of the United States Board of Tax Appeals involving the taxability of these maintenance funds, and there has been one decision by the United States Courts. The cases to which we refer are as follows:

Appeal of the Los Angeles Cemetery Association, 2 B. T. A. 495;

Appeal of Greenwood Cemetery Association, 2 B. T. A. 910;

Appeal of the Springdale Cemetery Association, 3 B. T. A. 223;

The Metairie Cemetery Association v. Commissioner of Internal Revenue, 4 B. T. A. 903;

Appeal of Troost Avenue Cemetery Association, 4 B. T. A. 1169;

Inglewood Park Cemetery Association v. Commissioner of Internal Revenue, 6 B. T. A. 386;

Troost Ave. Cemetery Co. v. United States, 21 F. (2d) 194.

It should be remembered that there is a practice whereby the Commissioner may acquiesce in decisions of the United States Board of Tax Appeals which are adverse to him. If he announces his formal acquiescence in a decision, that decision becomes binding upon the Commissioner and the principal laid down by the Board in its decision becomes the rule of law thereafter followed by the Commissioner. The Commissioner has acquiesced in all of the above mentioned Board decisions which were adverse to him, except that in *Inglewood Park Cemetery Association v. Commissioner of Internal Revenue.* In that case no acquiescence has yet been announced though the time for the Commissioner to appeal has expired and no appeal has been taken from the Board's decision.

We will briefly review the above mentioned decisions.

In the case of the Los Angeles Cemetery Association, 2 B. T. A. 495, decided September 8, 1925, it was held that amounts placed in a perpetual care fund by a cemetery association which agreed in consideration of specific payments to care for graves or plots in perpetuity, constituted trust funds under the California law, and it was spe-

cifically held that since none of these funds could be used for any purpose other than for such permanent maintenance, they could not be gain or income to the taxpayer. The Board in an opinion by Judge Graupner, used the following language:

> "The taxpayer sells nothing upon which a gain can be made to the person who enters into a contract for perpetual care; it takes nothing which it can use for its own purposes; it receives nothing which it may distribute to its stockholders; it holds nothing which it can ultimately distribute to itself for its own uses. The taxpayer as a trustee can exercise no discretion in the accumulation or distribution of the fund accumulated from perpetual care contracts. It is bound to perform a defined service with such fund and from that there can be no gain to be classed as income. We express no opinion whether interest or increment earned by such funds would be taxable as income."

This language applies equally to appellant's situation. The twenty per cent. which it received and agreed by formal resolution of its Board and by agreement with the purchasers to place in the permanent maintenance fund could not be used for its own purpose. It could not be distributed to its stockholders.

The next decision of the Board of Tax Appeals was in the Appeal of Greenwood Cemetery Association, 2 B. T. A. 910, decided October 19, 1925. The Greenwood Association was a Washington corporation. In 1893 it adopted rules and regula-

tions for the perpetual care of graves. Its contracts provided specifically that the amounts paid into the perpetual care fund should be held as a trust fund, the income from which alone was to be available by the Cemetery Association in caring for lots. The findings of fact contained this statement:

> "In the sale of perpetual care the stockholders of the association are benefited to the extent that the corporation uses the income of the perpetual care fund in the care of the cemetery and the payment of upkeep and running expenses in general, but the principal of the perpetual care fund is set up in a 'Liability Account' and the corporation is liable to the contributors of said fund for the perpetual care of graves as shown by the written agreement made by the corporation and each purchaser of perpetual care. The income from the perpetual care fund has been and is mingled with other income and was accounted for as income by the taxpayer in its 1918 and other income-tax returns."

Upon the authority of the Los Angeles Cemetery Association decision the Commissioner's attempt to include the trust fund payments in the Greenwood Company's income was disallowed. The Greenwood case differs from the present case in that the funds in the Greenwood case were made trust funds by express agreement, while in the case now before the court the trust is implied. In other respects the cases are identical, including particularly the circumstance that in both cases

the income from the trust fund has been mingled with funds of the taxpayer in the maintenance and care of the property.

The next case decided by the Board was that of Springdale Cemetery Association, 3 B. T. A. 223. The taxpayer was an Illinois corporation. The case was decided on December 21, 1925. It is the only one in which the decision has been in favor of the Commissioner. The decision contains the following findings of fact:

> "The corporation's by-laws contained no provisions for appropriating any part of receipts from the sale of lots as such perpetual care fund, and no resolution to that effect was passed by the directors. The directors by informal decision set up such a reserve on the books. The amount of 25 cents a square foot was an estimate of the amount required to provide a sufficient fund for future care."

The opinion in the Springdale case was by Mr. Sternhagen. The company's situation was clearly distinguished from that of the Los Angeles Cemetery Association. It was brought out that in Illinois it was permissive to create a trust fund for permanent maintenance and although the company's charter provided that the company might create by by-law funds for repair and maintenance the company had not seen fit to do so. The decision contains this language:

> "The taxpayer voluntarily set up a reserve based on an estimate, but there is lacking the

> clear evidence necessary to establish a trust. So far as the record shows, the directors might at any time reduce the fund or perhaps wipe it out, without restraint, their liability, if any, being one for breach of covenant or contract."

The Springdale case is to be distinguished from the case now on appeal in that in the Springdale case, there was no by-law or resolution of the directors calling for a perpetual care fund and there is no finding of fact whatsoever indicating that sales were made with any understanding or agreement that such fund should be maintained for the benefit of purchasers. Under the findings of fact made by the Board, the decision seems sound, since the fund set up on the books of account was quite apparently simply a reserve for future maintenance without any of the elements tending to make it a trust fund. It is settled law that such reserves for future maintenance are not deductible from gross income in computing taxable net income.

The next case before the Board was that of the Metairie Cemetery Association, 4 B. T. A. 903, decided September 22, 1926. The Metairie Association was a Los Angeles corporation. It made sales contracts of two kinds. In one class of contract there was a specific provision that the amount received by the Association was received in trust for the lot owner and that the income only on the amount so received was to be used for the purpose of upkeep of the cemetery lots and that such agree-

ment should continue perpetually. In the other class of contract there was no such provision. However, there had been a formal resolution of the Association's board of directors providing that all sums received by the Association in consideration of which it obligated itself to keep in perpetuity all tombs and surrounding grounds in good order were to be recognized as trust funds to be invested as the board of directors might direct, the income accruing therefrom to be alone expended. By a resolution of the directors adopted some years after the end of the years in dispute before the Board, all funds received for perpetual care contracts were specifically made subject to the trust whether or not covered by contracts containing the trust fund provisions. The findings of fact contained this statement:

> "While there were only thirteen of the perpetual-care contracts entered into during the taxable years involved which contained a specific provision to the effect that the funds received under such contracts were received in trust by the taxpayer, the other contracts entered into during the taxable years, as well as all of the contracts of perpetual care, were entered into with the specific understanding on the part of the corporation and the lot owners that the funds received by the corporation under such contracts would be held in trust for the specific purposes mentioned in the contract. The fact that the funds were received in trust was specifically explained to the lot owners by an officer of the corporation when

> the contracts were signed and it was definitely understood by all concerned that such funds were to be held in trust."

The Board decided this case in favor of the Cemetery Association upon the authority of its previous decisions, particularly that of the Los Angeles Cemetery Association, and it is interesting to note that the opinion opens with the following statement:

> "The Commissioner concedes that if the Board finds as a matter of law that the amounts received by the taxpayer under the perpetual-care contracts were received in trust, then the amounts are not taxable to the taxpayer but that the case would then be controlled by the decision of the Board in the Appeal of Los Angeles Cemetery Association."

The opinion contains also the following statement:

> "The evidence is that at the time the contracts were entered into it was agreed that the money would be held in trust for the specific purposes of the contract. This being true, we are of the opinion that a valid trust was created by parol in those contracts where there was no specific provision to that effect. The only reason that certain of the contracts contained that express provision was the fact that those lot owners insisted upon the agreement being included in writing in the contrcat."

The decisions heretofore cited adopted the practical and common-sense view of these permanent care funds and held them to be trust funds, the

facts and circumstances indicating that such was the understanding of the parties.

The next case decided by the Board was that of Troost Avenue Cemetery Association, 4 B. T. A. 1169, decided September 29, 1926. In that case the Association had placed the maintenance funds with a trust company. The Commissioner maintained that the creation of this trust fund was simply the creation of a reserve to provide for future expenses of the corporation. The decision was in favor of the taxpayer. The case is interesting only as showing the length to which the Commissioner went in attempting to exact taxes on funds of this character.

The last case decided by the Board was that of *Inglewood Park Cemetery Association v. Commissioner of Internal Revenue,* decided on March 2, 1927, 6 B. T. A. 386. The Inglewood Park Association was a California corporation. In the findings of fact it is stated that:

> "Salesmen employed by the petitioner were instructed to assure the purchasers of burial lots that 25 per cent. of the purchase price would go into a fund for the perpetual care of the lots. Each deed executed to convey title to purchasers of lots contains the following:
>
> 'Said lot is granted with right to the grantee for perpetual care thereof by and at the expense of said Cemetery Association'."

In the Inglewood Park case the Board sustained the position of the Cemetery Association and held that the assurance of salesmen that 25 per cent. of the purchase price would go into a fund for the perpetual care of the lots, accompanied by the covenant of the Association to care for the lots in perpetuity, constituted a parol agreement not in contravention of the writings, and that the amounts so placed in the perpetual care fund became trust funds and were not part of the income of the Association.

The case of *Troost Ave. Cemetery Co. v. United States*, 21 F(2d) 194, involved the taxability of the proceeds of sales of cemetery lots placed in the hands of a third party as trustee, such proceeds constituting a permanent maintenance fund. The facts were similar to those in the Troost Avenue case before the Board.

The Court decided in favor of the taxpayer, citing with approval the Los Angeles, Greenwood, Metairie and Troost Avenue decisions of the Board. The Inglewood case was decided by the Board only the day before the Court's decision and probably it had not come to the Court's attention.

We believe that the decisions of the Board of Tax Appeals mentioned above are in accordance with the purpose and letter of the various Revenue Acts, but we believe that the majority of the Board erroneously applied to the facts in the Portland

case the principles set forth in their previous decisions.

Again, we call attention to the following facts stipulated by the taxpayer and the Commissioner, for consideration in connection with the Board's decisions acquiesced in by the Commissioner:

1. The deeds given to purchasers of vaults and niches * * * contained a covenant running to the grantee and his heirs that the petitioner would maintain the columbarium containing said niche or vault forever.
2. The additions to the permanent maintenance fund were made pursuant to formal action of the board of directors and stockholders of the Association.
3. During the years involved in these appeals petitioner placed in a permanent maintenance fund twenty per centum of the gross selling price of all urns, niches and vaults sold by it.
4. "All sales by the petitioner were made with the representation to the purchasers that the covenant to maintain the property was backed by a permanent maintenance fund and that a portion of the purchase price paid by such purchaser would be placed in the maintenance fund."
5. "It was represented to each purchaser that the maintenance fund could not and would not be used for any other purpose."
6. The income from the maintenance fund has at all times been used for the maintenance and upkeep of the property sold, but by itself has been insufficient for that purpose.
7. For the most part the maintenance fund was invested in United States Liberty Bonds and War Savings Stamps.

8. The petitioner in its books of account did not treat the twenty per cent. of the selling price of such niches and vaults as part of its gross income.

These agreed facts are sufficient to exclude from appellant's taxable income the maintenance fund payments made during the years in question in accordance with the strictest rules laid down by the Board in the Los Angeles, Metairie and Inglewood cases. It is quite apparent that the Portland Association was in good faith endeavoring to build up a fund of sufficient size so that the income therefrom would be sufficient when all the property had been sold to provide adequately for permanent maintenance. All purchasers were informed of the existence of this fund. They were further informed that a portion of the amounts paid by them would be placed in this fund and that the fund would not and could not be used for any other purpose. It is stipulated that there were placed in *a permanent maintenance fund* amounts representing twenty per cent. of the selling price of urns, niches and vaults sold during the years in question. The importance of this stipulation is that the Government has recognized the fund itself as a permanent fund. The majority opinion of the Board to the effect that there was no more than a contractual obligation cognizable at common law and a means privately adopted by the corporation to fulfill it is not borne out by the facts. Not only

the income from the fund but the fund itself was devoted to this specific use. It did not and could not inure to the benefit of the corporation or its stockholders. Any misuse of the fund (and there is no suggestion that there ever was such misuse) would have resulted in the immediate taking away from the Association of the control of the fund and of the fund itself. Judged by standards of common sense, of plain intention and of legal effect, the maintenance fund was in the fullest sense a trust fund and being such was never income of the Association.

Mr. Arundell, the member of the Board who heard the case, wrote the dissenting opinion. He shows in detail that the facts in the Portland case bring it within the scope of the principles laid down in the Metairie and Inglewood Park cases. He shows that the presence of a state law forbidding the use of perpetual care funds for any other purposes may aid in establishing the fact of the existence of a trust but he shows that an equally valid trust may be created by the acts of the parties. No better or stronger summing up of the position of the appellant in this case could be given than that which appears in Mr. Arundell's dissenting opinion, the concluding paragraphs of which are as follows:

> "In both the Metairie and Inglewood cases there were express covenants concerning perpetual care, but there was nothing, other than oral representations to purchasers, as to the

fund to be held in trust. If an express trust can be gathered from oral representations in these cases, why does not the same rule apply here? But I do not think it necessary to decide in any of these cases whether the trust is express of implied; it is sufficient if either kind can be found. It has been often held that no technical language nor specific words are necessary to create a trust. As is said in *Chicago Rwy. v. Des Moines Rwy.*, 254 U. S. 196, 208:

> 'It needs no particular form of words to create a trust, so there be reasonable certainty as to the property, the objects and the beneficiaries. *Colton v. Colton*, 127 U. S. 300, 310.'

"There is here no lack of certainty, as urged by the respondent. The representations to purchasers and the deeds given them establish the purpose to which the funds were to be put and who the beneficiaries were. The records of the corporation determine the amount of the fund.

"The acts of the petitioner in representing to purchasers that it had a permanent maintenance fund, in covenating for perpetual care, and in formally setting aside a specified portion of the amounts received, we think were sufficient to create an enforceable trust. In *Holmes v. Dowie*, 148 Fed. 634, 638, it is said:

> 'It is a well recognized principle of equity that where a person accepts money or property to be used by him for the benefit of some other person or persons, or for the advancement of some lawful enterprise, such money or property constitutes a trust fund.'

"The prevailing opinion cites the decision in Springdale Cemetery Association, 3 B. T. A.

223. An essential difference between the cases is that in the Springdale case, it was found as a fact that:

> 'The corporation's by-laws contained no provisions for appropriating any part of the receipts from the sale of lots as such perpetual care fund, and no resolution to that effect was passed by the directors.'

"Nor does the case of Mead Construction Co., 3 B. T. A. 438, seem to be in point. There the sole question was whether a certain part of the amount due the taxpayer for paving work which was withheld by a municipality was income to the taxpayer; there was no question of whether any part of the amount received by the taxpayer was exempt from tax." (Transcript of Record, Pages 75-77.)

Respectfully submitted,

CAREY & KERR,

CHARLES E. McCULLOCH,

IVAN F. PHIPPS,

Attorneys for Petitioner and Appellant.

No. 5661

In the United States Circuit Court of Appeals for the Ninth Circuit

PORTLAND CREMATION ASSOCIATION, A CORPORATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

UPON PETITIONS TO REVIEW ORDERS OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

SEWALL KEY,
Special Assistant to the Attorney General.

EDWIN G. DAVIS,
Special Assistant to the Attorney General.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,

SHELBY S. FAULKNER,
Special Attorney, Bureau of Internal Revenue,
Of Counsel.

U.S. GOVERNMENT PRINTING OFFICE: 1929

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 5661

PORTLAND CREMATION ASSOCIATION, A CORPORATION, petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

UPON PETITIONS TO REVIEW ORDERS OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

PREVIOUS OPINION

The only previous opinion in the present case is that of the United States Board of Tax Appeals (R. 72), which is reported in 10 B. T. A. 65.

JURISDICTION

The petitions for review in the above-entitled cause involve income taxes for the years 1919, 1920, 1921, and 1922, in the amounts of $5,764.69 for the year 1919, $4,402.68 for the year 1920, $4,519.65 for the year 1921, and $2,192.25 for the year 1922, and are taken from three orders of redetermination by

the United States Board of Tax Appeals, promulgated April 19, 1928, as to the years 1919 and 1922, and April 20, 1928, as to the years 1920 and 1921. (R. 77–80.) The jurisdiction of this court is invoked by petition for review filed October 18, 1928 (R. 2) pursuant to the Revenue Act of 1926, ch. 27. Sections 1001, 1002, 1003, 44 Stat. 9, 110.

QUESTION PRESENTED

Is the petitioner entitled to exclude from gross income for the years 1919, 1920, 1921, and 1922, on the ground that they were trust funds, certain amounts set aside by it for the perpetual care of niches, urns, and vaults?

STATUTES INVOLVED

The pertinent provisions of the Revenue Act of 1918, ch. 18, 40 Stat. 1057, and of the Revenue Act of 1921, ch. 136, 42 Stat. 227, are identical.

The following statutes are from the Revenue Act of 1918:

> SEC. 233. (a) That in the case of a corporation subject to the tax imposed by section 230 the term "gross income" means the gross income as defined in section 213, * * *;
>
> SEC. 213. That for the purposes of this title (except as otherwise provided in section 233) the term "gross income"—
>
> (a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including in the case of the President of the United States, the judges of the Supreme and inferior courts

> of the United States, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, or the District of Columbia, the compensation received as such), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *.

STATEMENT OF FACTS

The petitioner was organized under the laws of the State of Oregon, for the purpose of constructing, maintaining, and operating crematories and columbaria and conducting the business of incinerating human remains and the burial and perpetual care of the ashes resulting therefrom, and conducting the business of funeral director and undertaker. During the years in question the petitioner operated a crematorium and sold niches and vaults in a building maintained for the repository of incinerated human remains and for the burial of the dead. (R. 67.) Deeds, identical in form save as to the description of the particular niche or vault, were given to purchasers. These deeds contained a covenant, running to the grantee and his heirs, that the petitioner would maintain the columbarium

containing the niche or vault forever. (R. 68.) At a meeting of the Board of Directors, on March 3, 1920, a resolution was adopted setting aside, from and after January 1, 1919, twenty per cent of the gross receipts from the sale of niches, urns, and vaults, to the maintenance fund. (R. 69.) During the years in question, the following amounts, equal to twenty per cent of the gross sales price of all urns, niches, and vaults sold by it were placed in the permanent maintenance fund: For the year 1919, $12,827.16; 1920, $17,906.20; 1921, $17,076.73; 1922, $17,538.03. During 1919 this amount was set aside by an informal agreement of the Acting Board of Directors, which action was confirmed by the Directors' meeting mentioned above, and by a stockholders' meeting of December 11, 1919. (R. 70, 68.) For the years 1920, 1921, and 1922, the additions to the maintenance fund were made pursuant to the above-mentioned resolution.

All sales by the petitioner were made with the representation to the purchasers that the covenant to maintain the property was backed by a permanent maintenance fund, and that a portion of the purchase price would be placed in that fund, which fund could not be used for any other purpose. No representations were made as to the handling and control of the fund, save that it was to be handled and controlled by the petitioner. The income from the maintenance fund has at all times been used for the maintenance and upkeep of the property sold, but always through the regular income and expense

accounts of the corporation. The income from the fund was mingled with other income and expended for maintenance along with other funds of the petitioner, and was credited during the years in question directly to the profit and loss account. (R. 70–71.)

During the years in question the maintenance and upkeep of the property required more money than the income from the maintenance fund. This deficiency was supplied from the income of petitioner, and not from the principal of the maintenance fund. Prior to November 3, 1920, there was no separate investment account maintained for this fund, but the amounts thereof were in part mingled with other assets of the petitioner. On that date the petitioner invested $29,816.51 in Liberty Bonds, and these were carried in an account entitled "Investment-Reserve for Maintenance." (R. 71.) Additions were made to this account during 1921, the balance in the account on December 31, 1921, being $35,548.09. On December 31, 1922, the balance to the credit of this account was $65,348.12, included in which was a loan of $20,000 made by the fund to the petitioner. The petitioner's books of account showed as gross sales the amounts received from the purchase of urns, niches, and vaults, less twenty per cent thereof, which was placed in the maintenance fund, and which did not appear as a part of the item "gross sales." (R. 72.) The Commissioner of Internal Revenue determined deficiencies

for the years in question, and from his determinations the petitioner appealed to the Board of Tax Appeals. (R. 7, 22, 31.) The separate petitions were consolidated for hearing, and thereafter the determinations of the Commissioner were approved by the Board. From the decision of the Board the petitioner brings this petition for review.

SUMMARY OF ARGUMENT

No trust was created either orally or in writing and none can be implied from the circumstances of this case. The decision of the Board of Tax Appeals was right on the facts and the same should be affirmed.

ARGUMENT

The amounts received by petitioner from the sale of niches and vaults, and placed in a permanent maintenance fund, do not constitute a trust and must be considered in determining the petitioner's gross income

The only question for determination in this case is whether or not the amounts set aside by the petitioner for the maintenance fund constitute a trust of which petitioner is the trustee, and the niche or vault owners are the beneficiaries. If the maintenance fund was a trust fund, then it is conceded that the sums in question can not be considered in computing the gross income of petitioner. If it was not a trust fund, however, then these sums must be so considered, and the Board of Tax Appeals must be sustained.

Examination shows that the facts are not such as would lead a court to impress the fund with a trust.

Each deed given by petitioner for a vault or niche contained a covenant to the effect that the property would be perpetually maintained. Such a covenant amounts to no more than a contractual obligation. Salesmen of petitioner represented to prospective purchasers that a proportion of the purchase price would be devoted to this fund, but it does not appear that any representations were made as to the proportion of the purchase price to be so devoted. An allocation to the fund of one per cent, rather than twenty per cent, would be a compliance with such representations as were made. Giving to such representations their maximum effect, it can not be said that they do more than create a contract obligation. It thus appears that the contracts with purchasers do not create a trust, either written or oral, express or implied.

Other facts developed by the record directly tend to negative the idea of a trust, and show that the fund was no more than a reserve set aside to take care of future expenses. Such a reserve is not deductible from gross income. In this connection it may be noted that the fund is designated by petitioner as "Investment-Reserve for Maintenance (Liberty Bonds, W. S. S., etc.)." (R. 71.)

Prior to January 1, 1919, the amount placed in this maintenance fund was ten per cent of the gross purchase price, rather than twenty per cent as was the case after that date. It should be noted also that for the year 1919 the amount was set aside by acting officers and their action was not ratified

until a year later, when it might have been completely disaffirmed. It is inconsistent with the idea of a valid trust that the officers *of the trustee* possessed the power to dissipate the fund or divert it to alien purposes. There was no obligation on the part of the petitioner to set aside any particular portion of the purchase price, the amount set aside was not known to the prospective purchaser, and there was no obligation on the company to maintain in the fund such sums or proportions as were credited to it. Moreover, the facts point to the conclusion that the fund was not considered by petitioner as a trust fund. It, with its income, was freely mingled with other funds of the company up to the year 1922, and was considered so much the property of petitioner that it felt itself at liberty to borrow from the fund for its own use.

The petitioner in the instant case is seeking to exclude from gross income twenty per cent of the gross amounts received from the sale of niches and vaults for the purpose of maintenance, yet the petitioner has been allowed as a deduction from gross income the amounts actually expended or incurred during the taxable years for such maintenance. The record does not directly disclose this to be true, but it is disclosed in an indirect way. The Board in its opinion states as follows (R. 73):

> Of course such sum as it expends or incurs annually in the performance of its business functions, whether of maintenance or otherwise, is a proper deduction.

The Board then states that judgment will be entered on fifteen days' notice. (R. 74.) Thereafter the Board entered its judgments in accordance with the judgments proposed by the Commissioner pursuant to the Board's report of January 20, 1928. Notice of the proposed judgments was given to petitioner and petitioner did not oppose. (R. 78, 79, 80.) The judgments entered by the Board found the same deficiencies that the Commissioner had proposed in the three deficiency notices. (R. 13, 26, 35.)

It is thus clear and can not be disputed that the Commissioner in his determination of the deficiencies included in gross income the full amounts received from the purchasers of the niches and vaults and allowed as a deduction for expenses the amounts actually expended or incurred in the maintenance of the niches and vaults. The petitioner accordingly has not been deprived of a deduction from gross income of the amounts actually expended or incurred during the taxable years in the performance of its obligation to maintain the niches and vaults.

There has been one decision by a Federal district court upon a question similar to the one here involved and six decisions by the Board of Tax Appeals. The holdings in these cases are all consistent with the position taken by the Commissioner in this case.

In the case of *Troost Avenue Cemetery Co.* v. *United States*, 21 F. (2d) 194, the association exe-

cuted a trust agreement with a trust company whereby the company received and held a certain percentage of the gross amount received from the sale of cemetery lots in trust for the benefit of the then owners and for the purchasers of said lots absolutely free of any control on the part of the Cemetery Association. The court there held that a trust had been created and that the amounts devoted to this trust could not be considered as a part of the gross income of the Cemetery Association. Comparison of that with the instant case will clearly demonstrate the essential differences which make impossible a like conclusion. The instant case shows no such clear segregation of the funds set aside for maintenance nor does it show any such definite agreement as to the allocation of a specific part of the purchase price.

The decisions of the Board of Tax Appeals, wherein it was held that a trust fund had been established, reveal similarly important distinctions.

In the *Appeal of the Los Angeles Cemetery Association,* 2 B. T. A. 495, the Board held that a trust was created. A separate and specific sum was paid for perpetual care *in addition to the sum paid as the purchase price of the grave or plot.* The agreement providing for the payment of the separate and specific sum was in writing. In the instant case there was no oral or written agreement whereby a separate and specific sum was paid to be used for perpetual care. The Board in that case based its decision primarily upon the provisions of the Cali-

fornia Civil Code, Section 617, which provides tha the sums received by virtue of a contract for perpetual care can only be used for such purposes and prescribes the securities in which the perpetual care funds may be invested. The statutes of Oregon contain no such provisions.

In the *Appeal of Greenwood Cemetery Association,* 2 B. T. A. 910, the Board held that a trust was established upon the authority of the *Appeal of the Los Angeles Cemetery Association, supra.* In the *Greenwood case* the association had published rules and regulations of the cemetery in full as well as the plans for the perpetual care and the charges therefor. The lot prices and the charge for perpetual care were quoted separately to prospective purchasers and when sales were made the charges for the lot and for perpetual care were separate items. According to the agreement the principal paid in for perpetual care is held as a trust fund. The agreement for perpetual care was a written agreement.

The distinction between the *Greenwood case* and the instant case is obvious. In that case there was a written agreement providing that the principal paid in for perpetual care was to be held as a trust fund. There are other differences, but since there was an express declaration of trust in that case such differences need not be pointed out.

In the case of *The Metairie Cemetery Association* v. *Commissioner of Internal Revenue*, 4 B. T. A. 903 the Board held that a trust had been created.

In that case the Board in its opinion stated as follows (p. 909–910):

> There is no conflict in the evidence here with respect to the contracts. The evidence is that at the time the contracts were entered into it was agreed that the money would be held in trust for the specific purposes of the contract. This being true, we are of the opinion that a valid trust was created by parole in those contracts where there was no specific provision to that effect. The only reason that certain of the contracts contained that express provision was the fact that those lot owners insisted upon the agreement being included in writing in the contract. The same agreement, however, was actually made with all of the lot owners verbally.

This language of the Board makes clear the distinction between the *Metairie case* and the instant case. In that case there were express agreements, some oral and some in writing, that the money for perpetual care would be held in trust.

It is conceded that such a trust may be created by oral agreement as the Board held in the *Metairie case,* but in the instant case there was no express agreement either oral or written that a certain portion of the moneys received was to be held in trust.

In the *Appeal of Troost Avenue Cemetery Association,* 4 B. T. A. 1169, the Board held that a trust was established. The facts here were similar to those in *Troost Avenue Cemetery Co.* v. *United States, supra.*

In the case of *Inglewood Park Cemetery Association* v. *Commissioner of Internal Revenue,* 6 B. T. A. 386, the Board held that a trust was created. In that case prospective purchasers were told that twenty-five per cent of the purchase price would go into a fund for the perpetual care of the lots, while in the instant case prospective purchasers were told that a portion, not a *fixed* portion, would be placed in a maintenance fund.

In the *Inglewood case* twenty-five per cent of the purchase price was deposited in a special bank account, while in the instant case prior to November 3, 1920, there was no separate investment account on petitioner's books (R. 44), much less in a special bank account. At no time during the taxable years in the instant case was there maintained a special bank account.

In the *Inglewood case* the Association was governed by the laws of California and the Board based its decision in part upon the provisions of the California Civil Code, Section 617.

Of all the decisions involving perpetual care funds of cemetery associations, there have only been two holding that the moneys received for perpetual care did not constitute a trust fund. These two decisions are the decision of the Board in the instant case and the decision of the Board in the *Appeal of the Springdale Cemetery Association,* 3 B. T. A. 223. In the latter case the certificate of purchase provided for the care of lots during the existence of the cemetery. The taxpayer in that case volun-

tarily set up a reserve for maintenance. That is what happened in the instant case. The opinion in the *Springdale case* does not disclose that there was any express agreement either oral or written as to the establishment of a trust, and that is true in the instant case. The facts in the instant case are much like those in the *Springdale case* and that decision should be regarded as more persuasive here than any other decision of the Board of Tax Appeals.

CONCLUSION

Since there was in the instant case no express agreement, either oral or written, creating a trust, and since a trust cannot be implied from the surrounding circumstances, it is respectfully submitted that the judgment of the Board of Tax Appeals should be affirmed.

MABEL WALKER WILLEBRANDT,
Assistant Attorney General.
SEWALL KEY,
Special Assistant to the Attorney General.
EDWIN G. DAVIS,
Special Assistant to the Attorney General.
C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.
SHELBY S. FAULKNER,
Special Attorney,
Bureau of Internal Revenue,
Of Counsel.

FEBRUARY, 1929.

U. S. GOVERNMENT PRINTING OFFICE: 1929

No. 5662

United States

Circuit Court of Appeals

For the Ninth Circuit.

B. J. RUCKER,

Petitioner,

vs.

DAVID H. BLAIR, Commissioner of Internal Revenue,

Respondent.

Transcript of Record.

UPON PETITION TO REVIEW ORDER OF THE UNITED STATES BOARD OF TAX APPEALS.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 5662

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Circuit Court of Appeals

For the Ninth Circuit.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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[1*] DOCKET Number 2928.

B. J. RUCKER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

For Taxpayer:

HERBERT E. SMITH, Esq., W. P. BELL, Esq., J. B. FOGARTY, Esq.

For Commissioner:

GRANVILLE BORDEN, Esq.

DOCKET ENTRIES.

1925.

Mar. 30—Petition received and filed.

Apr. 1—Copy of petition served on solicitor.

Apr. 1—Notification of receipt mailed taxpayer.

Apr. 21—Answer filed by solicitor.

Apr. 23—Copy of answer served on taxpayer—Assigned to reserve calendar.

1927.

Apr. 13—Hearing date set June 14, 1927, at County City Bldg., Seattle, Wash.

June 14—Hearing had before Mr. Morris on the merits. Motion that 2928 and 2929 be consolidated and heard together. Briefs due Sept. 15, 1927.

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*Page-number appearing at the top of page of original certified Transcript of Record.

Aug. 9—Transcript of hearing filed—June 14, 1927.

Aug. 31—Motion for extension to Oct. 15th to file briefs filed by G. C. granted 9–3–27.

Sept. 8—Brief filed by taxpayer.

Sept. 29—Brief and finding filed by G. C.

Nov. 30—Motion that time for filing proposed redetermination be set for a date subsequent to 12–20–27, filed by taxpayer.

Dec. 27.—Findings of fact and opinion rendered—Mr. Morris—Judgment will be entered on 15 day notice.

1928.

Feb. 8—Notice of settlement filed by taxpayer.

Feb. 10—Notice allowing G. C. until 2–28–28 to file alternative settlement for hearing on 3–8–28. Failure to do so appeal set for 3–6–28.

Feb. 11—Notice of settlement filed by G. C. Copy served 2–15–28.

Feb. 11—Copy of proposed redetermination served on G. C.

Mar. 8—Hearing had before Mr. Morris on settlement under Rule 50. Contested.

Mar. 15—Transcript of hearing 3–8–28. See 2929.

Mar. 20—Order of redetermination entered.

Sept. 14—Petition for review by U. S. Cir. Ct. of Appeals 9th Cir., with assignments of error filed by taxpayer.

Sept. 14—Proof of service filed.

Oct. 4—Praecipe of record filed.
Oct. 4—Proof of service filed by taxpayer.

Now, October 31, 1928, the foregoing docket entries certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[2] Filed Mar. 30, 1925. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 2928.

Appeal of B. J. RUCKER, of Lake Stevens, Wash.

PETITION.

The above-named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter (IT:CR: G–6, GJG.) dated February 27, 1925, and as a basis of his appeal sets forth the following:

1.

The taxpayer is an individual partner in the copartnership of Rucker Bros., Lake Stevens, Washington, which is composed of said taxpayer and his brother, W. J. Rucker of Lake Stevens, Washington, each owning a one-half interest in said copartnership.

2.

The deficiency letter (a copy of which is attached) was mailed to the taxpayer on Feb. 27, 1925, and states a deficiency of $3,463.21.

3.

The taxes in controversy are income taxes for the calendar year 1918 and are less than $10,000, to wit, $3,463.21.

[3] 4.

The determination of the tax is based on the following errors:

(NOTE—The additional assessment as computed by the Commissioner is based upon audits of the returns of B. J. Rucker and Rucker Bros. (a copartnership) made by an agent of the Bureau of Internal Revenue. The errors here to be stated appear in the report of the audit of Rucker Bros. (a copartnership) (No. 3049–W, IT:EN:T–AIW.) dated November 3, 1924, and signed by F. H. Goudy, Supervising Internal Revenue Agent).

ERROR #1—The Commissioner has added to the income of the partnership $24,-231.97, "Timber sold Everett Logging Co." (Schedule 1, item (g) of above mentioned report.)

ERROR #2—The Commissioner has computed the tax on the entire distributive share of B. J. Rucker in the income of Rucker Bros. (a partnership).

5.

The facts upon which the taxpayer relies as the basis of his appeal are as follows:

FACTS RE ERROR # 1.

This addition to the income of the partnership represents the total purchase price of certain tim-

ber sold by the Tulalip Co. (a corporation) to the Everett Logging Co. An initial payment of $5,000 was made by the latter to the former in September, 1916. The balance of $19,231.77 was paid presumably to C. W. Miley (a stockholder in the Tulalip Co.) some time prior to December 31, 1927. This timber was never owned by Rucker Bros. (a partnership) nor did they receive the proceeds from its sale, the final payment was made in 1917, and the sale became a closed transaction not later than December 31, 1917.

FACTS RE ERROR #2.

During the entire year 1918, B. J. Rucker was a married man living with his wife, Ruby Rucker, and said B. J. Rucker had no separate income in the year 1918.

[4] The taxpayer, in support of his appeal, relies upon the following propositions of law:

1. The income received by a corporation may not be included in the income of a partnership for the purpose of determining the income tax liability of the members thereof.
2. Any loss or gain resulting from a sale must be reported in the year in which the transaction occurred.
3. Under the law and decisions of the courts in the State of Washington, all the property and all the earnings of either spouse are presumed to be the property and earnings of the marital community, and the burden of proof is on any party claiming that said property or

income or any portion thereof is the separate property of one spouse or the other.

WHEREFORE, the taxpayer respectfully prays that this Board may hear and determine its appeal.

(Signed) HERBERT ELLES SMITH.
HERBERT ELLES SMITH (C. P. A.),
1124 White Bldg., Seattle, Wash.,
Attorney for the Taxpayer.

State of Washington,
County of Snohomish,—ss.

B. J. Rucker, being duly sworn, says that he is the taxpayer, named in the foregoing petition; that he has read the said petition, or had the same read to him, and is familiar with the statements therein contained, and that the facts therein stated are true, except such facts as are stated to be upon information and belief, and those facts he believes to be true.

(Signed) B. J. RUCKER.

Sworn to before me this 24 day of March, 1925.

[Seal] (Signed) J. J. SHEEHAN,
Notary Public.

[5] COPY.

February 27, 1925.

IT:CR:G–6.
GJG.
Mr. B. J. Rucker,
Lake Stevens, Washington.
Sir:

Your claim for the abatement of $12,591.20 income tax for the year 1918 has been examined.

A reaudit of your return for the year involved discloses an over-assessment amounting to $9,127.99, as shown in Schedule 1 attached hereto. In the determination of this overassessment, due consideration was given to the statements set forth in your claim and appeal filed.

Your claim will therefore be rejected for $3,463.21.

The Collector of Internal Revenue for your district will, upon the expiration of thirty days from the date of this letter, be officially notified of such rejection.

Upon receipt of notice and demand from that official, payment should be made to his office in accordance with the conditions of the notice.

Respectfully,
J. G. BRIGHT,
Deputy Commissioner.
By L. I. LOHMANN,
Head of Division.

Enclosure:
Schedule 1.

[6] B. J. Rucker. Year ended Dec. 31, 1918.

SCHEDULE 1.

Computation of Tax.

Net income disclosed by Revenue Agent's Supplemental Report dated Nov. 3, 1924			$47,599.90
Less: Exemption			2,400.00
Income subject to normal tax			$45,199.90
Normal tax at 6% on	$ 4,000.00	$ 240.00	
Normal tax at 12% on	41,199.90	4,943.99	
Surtax on	46,000.00	4,610.00	
Surtax at 22% on	1,599.90	351.98	
Total tax			$10,145.97
Previously assessed:			
Original assessment April 29, 1919		$ 3,082.24	
Additional assessment May 29, 1920		3,600.52	
Assessed March 1924, P. 4, L 8, Spl 10		12,591.20	
Total taxes previously assessed			$19,273.96
Overassessed			9,127.99

Now, October 31, 1928, the foregoing petition certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

---

[7] Filed Apr. 21, 1925. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 2928.

In re: Appeal of B. J. RUCKER, Lake Stevens, Washington.

ANSWER.

The Commissioner of Internal Revenue by his attorney, A. W. Gregg, Solicitor of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

(1) Admits the allegations contained in paragraphs 1, and 3.

(2) Admits that the Commissioner has added to the income of the partnership of Rucker Brothers the amount of $24,231.97, representing timber sold to the Everett Logging Company.

(3) Denies each and every other material allegation of fact contained in the petition.

PROPOSITIONS OF LAW.

(1) The Commissioner has not, since the enactment of the Revenue Act of 1924, determined a de-

ficiency in tax or proposed to assess an additional tax for 1918 against this taxpayer.

(2) Income for 1918 of the taxpayer and his wife has been properly adjusted by the Commissioner.

(3) Taxpayer's distributive share of the amount of $24,231.97, representing the profit arising from the sale of the timber mentioned above, was properly included in taxpayer's gross income for 1918.

WHEREFORE it is prayed that the taxpayer's petition be dismissed and the appeal denied.

A. W. GREGG,
Solicitor of Internal Revenue,
Attorney for Commissioner of Internal Revenue.

Of Counsel:

A. H. FAST,
Special Attorney,
Bureau of Internal Revenue.

Now, October 31, 1928, the foregoing answer certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[8] A true copy.

Teste: B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET Nos. 2928 and 2929.

Promulgated December 27, 1927.

B. J. RUCKER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

W. J. RUCKER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

The respondent erred in adding to the income of the partnership, of which the petitioners were members, the gross proceeds from the sale of certain timber by the Tulalip Company to the Everett Logging Company in 1915.

Petitioner B. J. Rucker's distrbutive share of partnership income held to be separate property under the laws of the State of Washington, and therefore taxable to him.

J. B. FOGARTY, Esq., WILLIAM P. BELL, Esq., and HERBERT E. SMITH, C. P. A., for the Petitioners.

GRANVILLE S. BORDEN, Esq., for the Respondent.

This is a proceeding for the redetermination of

deficiencies in income taxes in the amounts of $3,463.21 and $3,463.20 asserted by the respondent against B. J. Rucker and W. J. Rucker, respectively, for the year 1918.

On motion of the parties it was ordered that the cases of B. J. Rucker, Docket No. 2928, and W. J. Rucker, Docket No. 2929, be consolidated and heard jointly.

There are two issues raised by the pleadings, the first of which is identical in both cases, and the second is raised only by the petition of B. J. Rucker. The issues are:

[9] 1. Whether the respondent has erred in adding to the income of the partnership for the year in question the sum of $24,231.97, representing timber sold to Everett Logging Company.

2. Whether the respondent was in error in computing the tax of B. J. Rucker, a married man, on the entire distributive share of the partnership of which he was a member.

FINDINGS OF FACT.

The petitioners herein comprise the copartnership known as Rucker Brothers, of Lake Stevens, Washington, each owning one-half interest in said copartnership.

C. W. Miley, who was president of the Tulalip Company, a corporation, during the year 1912, and succeeding years, purchased a quantity of timber in that year in his own name, for which he paid the sum of $9,100. He in turn deeded it to the Tulalip Company for stock in that company, and that company thereupon sold it to the Everett Logging

Company in September, 1916, at a total sale price of $24,231.77, receiving as an initial payment therefor in 1916 the sum of $5,000 and in 1917 it received $18,675.37 in monthly payments, and in February, 1918, it received as a final payment the sum of $556.40. The timber in question was sold by the Tulalip Company to be paid for by the Everett Logging Company, as it was scaled and sold, and all of it was scaled and sold prior to December 31, 1917, with the exception of that represented by the payment of $556.40 in 1918. The initial payment of $5,000 was paid by the Everett Logging Company to the Tulalip Company in 1916 and the remaining balance was paid by checks which were sent to Miley, made payable to the company, [10] and he in turn endorsed them and cashed them, using the proceeds to pay off a debt that he had incurred in the company. The partnership of Rucker Brothers held fifty per cent of the stock of the Tulalip Company and Miley held fifty per cent.

B. J. Rucker was married in December, 1904, and he has lived continuously with his wife since that time. At the time of his marriage, Rucker owned a one-half interest in the copartnership of Rucker Brothers, the assets of which consisted of lands and town lots and some shares of stock in the Rucker Bank. Rucker Brothers were engaged in the real estate business at the time of Rucker's marriage, but in 1907 or 1908 the firm entered into the logging and sawmill business. The lands and town lots owned by the partnership at the time of Rucker's marriage were nonproductive properties from which

there has been no income from the time of his marriage to the present time. In fact they have paid in taxes several times what the properties would sell for to-day.

The profits earned by the partnership of Rucker Brothers have come from enterprises they have engaged in, such as timber and sawmill and logging operations for which the firm borrowed money and started. They have bought most of their timber on the installment plan making only a small initial payment therefor.

Rucker has kept no record of the property he had at the time he was married, nor of what he has accumulated subsequently to marriage.

Rucker Brothers purchased a quantity of timber from the Puget Mill Company in 1917 at a total purchase price of $625,000 for which they paid $5,000 in cash and the balance of $620,000 in promissory notes [11] extending over a period of several years, all of which notes were signed by W. J. and B. J. Rucker for the partnership. A portion of that timber was later sold at a profit of upward of $80,000. The portion of that timber that was not sold, was cut and sawed at their own mill and paid for as it was cut and removed.

During the period 1907 to 1916 the firm of Rucker Brothers borrowed several sums of money for use in the partnership.

All of Rucker's property at the time of his marriage was his equity in the partnership and all of his income has been from the partnership distributions.

Rucker Brothers filed an amended partnership return for the year 1918, showing therein $95,699.27 as the total distributive income of the partnership for that year divided $47,849.64 and $47,849.63 for W. J. and B. J. Rucker respectively.

The individual (amended) return of B. J. Rucker for 1918 shows total net income from the partnership of Rucker Brothers to be $47,849.63, from which a contribution of $268.73 and $10,957.58 were deducted, the latter amount being explained on the return as "net loss on dissolving corporation entirely owned by Rucker Brothers Partnership. Tulalip Company $20,059.82, Rucker $1,875.17, total $21,915.17, individual claim one-half under section 214 (1) Div. (4)," leaving a net taxable income of $36,623.32.

The individual (amended) return of W. J. Rucker for the year 1918 shows a total net income from the partnership of Rucker Brothers of $47,-849.64 from which the same deductions were taken as in B. J. Rucker's return with the same explanation, leaving a net taxable income for that year of $36,623.32.

[12] The respondent determined the net income of each to be $47,599.90.

OPINION.

MORRIS.—The first allegation of error is that the respondent added to the income of the partnership the sum of $24,231.97 "timber sold Everett Logging Co." and the respondent has admitted the fact of such addition.

Certain timber was originally purchased by Miley in the spring of 1912 which he sold to the Tulalip Company and that company in turn sold it to the Everett Logging Company in 1916 for the total sum of $24,231.97. The purchase price to the Everett Logging Company was paid $5,000 in 1916, $18,-675.35 in 1917, and $556.40 in 1918. All of the foregoing amounts were paid to Tulalip Company and Miley endorsed the checks received subsequently to the initial cash payment of $5,000 in 1916 and made use of the proceeds to liquidate an indebtedness that he had incurred in the company.

While Rucker Brothers owned fifty per cent of the stock of the Tulalip Company and possibly there was some intermingling of accounts, the testimony is perfectly clear that the timber in question was owned by the Tulalip Company, sold by it, and further that the sale price was paid to it. We can see no justification for holding that the sum in question is taxable directly to the members of the firm of Rucker Brothers. Furthermore, even if we were to assume that the income was in fact taxable to the members of the firm of Rucker Brothers, we do not understand upon what theory in law it would be taxable to them in 1918, because it is clear that the transaction was consummated in 1916, and that all but a very small portion of the total sale price was received prior to December 31, 1917. We are of the opinion that the respondent erred in adding to the sum in question to the income of [13] the partnership of Rucker

Brothers in 1918, and we therefore sustain the contention of the petitioner.

The second allegation of error is urged by the petitioner B. J. Rucker, only, and it relates to the question of whether his distributive share of the profits of the partnership of which he is a member, constitutes community income or whether it constitutes separate income and hence taxable to himself. The facts and circumstances with respect to this issue are the same as those existing in the Appeal of B. J. Rucker, Docket No. 3509, wherein we held that the income in question was derived from his separate property and was taxable to him and we are therefore bound by our decision in that case with respect to the issue in the instant case.

Reviewed by the board.

Judgment will be entered on 15 days' notice under Rule 50.

Now, October 31, 1928, the foregoing findings of fact and opinion certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

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[14] A true copy.

Teste: B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 2928.

B. J. RUCKER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ORDER OF REDETERMINATION.

Pursuant to the Board's findings of fact and opinion, promulgated December 27, 1927, the parties filed proposed redeterminations which came on for hearing on settlement, March 8, 1928, at which time the proposed redeterminations were taken under advisement. Due consideration having been given thereto, and it appearing that petitioner has failed to compute the deficiency in accordance with our findings of fact and opinion, and the respondent's computation showing a correct tax liability of $6,357.50, tax paid of $4,776.66, and previous assessments of $19,273.96 less $1,906.10 previously allowed, it is

ORDERED AND DECIDED: That, upon redetermination, the correct tax liability for 1918 is $6,357.50, the tax paid is $4,776.66, and the unpaid portion of the tax liability is $1,580.84; the previous assessments are $19,273.96 less $1,906.10 previously

allowed and the unpaid assessment to be abated is $11,010.36.

Entered: Mar. 20, 1928.

(Signed) LOGAN MORRIS,
Member U. S. Board of Tax Appeals.

Now, October 31, 1928, the foregoing order of redetermination certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[15] Filed Sep. 14, 1928. United States Board of Tax Appeals.

In the United States Circuit Court of Appeals for the Ninth Circuit.

——— Term, 1928.

No. ——.

B. J. RUCKER,
Petitioner,

vs.

DAVID H. BLAIR, Commissioner of Internal Revenue,
Respondent.

PETITION TO REVIEW DECISION OF UNITED STATES BOARD OF TAX APPEALS.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Your petitioner, B. J. Rucker, respectfully represents that he is a resident and citizen of the city of Everett, County of Snohomish, and State of Washington.

I.

NATURE OF CONTROVERSY.

1. On the twenty-seventh day of December, 1927, the United States Board of Tax Appeals promulgated its findings and opinion in the case of B. J. Rucker, petitioner, vs. David H. Blair, Commissioner of Internal Revenue, respondent, Docket #2928, in which opinion it was held that all of petitioner's distributive share of the income of Rucker Bros. partnership for the year 1918, was petitioner's separate income and no part thereof was community income of said petitioner and his wife, Ruby Rucker.

2. On March 20, 1928, the United States Board of Tax Appeals entered its final order of redetermination of the tax liability of said petitioner for the year 1918, based on said opinion.

II.

ORDER OF REVIEW.

A review of the decision of the United States Board of Tax Appeals in the above-entitled pro-

ceeding is sought by the United States Circuit Court of Appeals for the Ninth Circuit.

III.

ASSIGNMENTS OF ERROR.

Your petitioner says that in the record and proceedings of said United States Board of Tax Appeals, in the above-entitled cause and in the final order entered therein, there is manifest error, and for error petitioner assigns the following:

1. The Board erred in holding that all of the said petitioner's distributive share of the income of Rucker Bros. for the year 1918 was the separate income of the petitioner.

[16] 2. The Board erred in failing to hold that all of the said petitioner's distributive share of the income of Rucker Bros. for the year 1918 was community income of the said petitioner and his wife.

3. The said findings of fact promulgated by the Board are concurred in by the petitioner, but the Board erred in its conclusions.

Your petitioner, therefore, prays for review, by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the United States Board of Tax Appeals in the above-entitled case, in accordance with the Act of Congress in such case made and provided, and that the Clerk of said Board be directed to transmit and deliver to the Clerk of said court certified copies of all and every of the documents listed and set forth in the rules adopted by said United States Circuit Court of

Appeals for the Ninth Circuit providing for the presentation of petitions for review of decisions.

And he will ever pray, etc.

B. J. RUCKER.

State of Washington,
County of Snohomish,—ss.

Personally appeared before me the subscribed, a notary public in and for said county, B. J. Rucker, petitioner above named, who, being duly sworn according to law, does depose and say that the facts set forth in the foregoing petition are true and correct.

B. J. RUCKER.

Sworn and subscribed before me this 6th day of Sept., 1928.

W. P. BELL,
Notary Public.

Now, October 31, 1928, the foregoing petition for review certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[17] Filed Oct. 4, 1928. United States Board of Tax Appeals.

Before the United States Board of Tax Appeals.

DOCKET No. 2928.

B. J. RUCKER

vs.

COMMISSIONER OF INTERNAL REVENUE.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare and, within sixty days from the date of the filing of the petition for review in the above stated case, transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit certified copies of the following documents:

1. The docket entries of proceedings before the United States Board of Tax Appeals in the case above entitled.
2. Findings of fact, opinion, and decision of the Board.
3. Order of redetermination and final decision.
4. Petition for review.

The foregoing to be prepared, certified, and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

W. P. BELL.
W. P. BELL,
Everett, Washington,
Attorney for B. J. Rucker.
J. B. FOGARTY.
J. B. FOGARTY,
Everett, Washington,
Attorney for B. J. Rucker.

September 28, 1928.

[18] Filed Oct. 4, 1928. United States Board of Tax Appeals.

In the United States Circuit Court of Appeals for the Ninth Circuit.

——— Term, 1928.

DOCKET No. 2928.

B. J. RUCKER,

Petitioner,

vs.

DAVID H. BLAIR, Commissioner of Internal Revenue,

Respondent.

NOTICE OF FILING AND SERVICE OF PRAECIPE FOR TRANSCRIPT OF RECORD.

To David H. Blair, Commissioner of Internal Revenue:

You are hereby notified that the petitioner above named has filed with the United States Board of Tax Appeals his praecipe for the record of certain parts of the proceedings in the above-entitled action, to be used in the review of the decision of the United States Board of Tax Appeals in the United States Circuit Court of Appeals for the Ninth Cir-

cuit, and a full, true and correct copy of said praecipe is herewith served upon you.

W. P. BELL.
W. P. BELL,
Everett, Wash.,
Counsel for Petitioner.
J. B. FOGARTY.
J. B. FOGARTY,
Everett, Wash.,
Counsel for Petitioner.

Service of the foregoing notice is hereby admitted and a copy thereof received together with copy of praecipe in the above stated case.

Dated this 3d day of October, 1928.

C. M. CHAREST.
M.

Now, October 31, 1928, the foregoing praecipe and notice of filing certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[Endorsed]: No. 5662. United States Circuit Court of Appeals for the Ninth Circuit. B. J. Rucker, Petitioner, vs. David H. Blair, Commissioner of Internal Revenue, Respondent. Transcript of Record. Upon Petition to Review Order of the United States Board of Tax Appeals.

Filed December 20, 1928.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5662

United States Circuit Court of Appeals for the Ninth District

B. J. RUCKER,
Petitioner,

vs.

DAVID H. BLAIR, Commissioner of Internal Revenue,
Respondent.

BRIEF OF PETITIONER

W. P. BELL,
J. B. FOGARTY,
Attorneys for Petitioner.

No. 5662

United States Circuit Court of Appeals for the Ninth District

B. J. RUCKER,
Petitioner,

vs.

DAVID H. BLAIR, Commissioner of Internal Revenue,
Respondent.

BRIEF OF PETITIONER

STATEMENT OF THE CASE

This is a proceeding to review the decision of the United States Board of Tax Appeals against the petitioner for the year 1918.

The facts as found by the Board necessary to a consideration of this review are as follows:

> "B. J. Rucker was married in December, 1904, and he has lived continuously with his wife since that time. At the time of his marriage Rucker owned a one-half interest in the copartnership of Rucker Brothers, the assets of which consisted of lands and town lots and some shares of stock in the Rucker Bank. Rucker Brothers were engaged in the real es-

tate business at the time of Rucker's marriage, but in 1907 or 1908 the firm entered into the logging and sawmill business. The lands and town lots owned by the partnership at the time of Rucker's marriage were nonproductive properties from which there has been no income from the time of his marriage to the present time. In fact they have paid in taxes several times what the property would sell for today.

"The profits earned by the partnership of Rucker Brothers have come from enterprises they have engaged in, such as timber and sawmill and logging operations for which the firm borrowed money and started. They (17) have bought most of their timber on the installment plan, making only a small initial payment therefor.

"Rucker has kept no record of the property he had at the time he was married, nor of what he has accumulated subsequently to marriage.

"Rucker Brothers purchased a quantity of timber from the Puget Mill Company in 1917 at a total purchase price of $625,000 for which they paid $5,000 in cash and the balance of $620,000 in promissory notes extending over a period of several years, all of which notes were signed by W. J. and B. J. Rucker for the partnership. A portion of that timber was later sold at a profit of $80,000. The portion of that timber that was not sold was cut and sawed at their own sawmill and was paid therefor as it was cut and removed.

"During the period 1907 to 1916 the firm of Rucker Brothers borrowed several sums of money for use in the partnership.

"All of Rucker's property at the time of his marriage was his equity in the partnership and

all of his income has been from the partnership distributions.

"Rucker Brothers filed an amended partnership return for the year 1918, showing therein $95,699.27 as the total distributive income of the partnership for that year divided $47,849.64 and $47,849.63 for W. J. and B. J. Rucker, respectively.

"The individual (amended) return of B. J. Rucker for 1918 shows total net income from the partnership of Rucker Brothers to be $47,-849.63, from which a contribution of $268.73 and $10,957.58 were deducted, the latter amount being explained on the return as "net loss on dissolving corporation entirely owned by Rucker Brother Partnership. Tulalip Company $20,059.82, Rucker $1,875.17, total $21,-915.17, individual claim one-half under section 214 (1) Div. (4)," leaving a net taxable income of $36,623.32.

"The individual (amended) return of W. J. Rucker for the year 1918 shows a total net income from the partnership of Rucker Brothers of $47,849.64 from which the same deductions were taken as in B. J. Rucker's return with the same explanation, leaving a net taxable income for that year of $36,623.32.

(12) The respondent determined the net income of each to be $47,599.90."

Transcript No. 5662, pp. 13, 14, 15.

On these facts the Board of Tax Appeals held that the Commissioner of Internal Revenue had correctly held that the entire distributive share of the income of B. J. Rucker in the partnership of Rucker Brothers was separate property as follows:

> "The second allegation of error is urged by the petitioner B. J. Rucker, only, and it relates to the question of whether his distributive share of the profits of the partnership of which he is a member, constitutes community income or whether it constitutes separate income and hence taxable to himself. The facts and circumstances with respect to this issue are the some as those existing in the Appeal of B. J. Rucker, Docket No. 3509, wherein we held that the income in question was derived from his separate property and was taxable to him and we are therefore bound by our decision in that case with respect to the issue in the instant case.
>
> *Transcript of Record*, p. 17.

The sole question to be determined by the court is whether the facts as found by the Board of Tax Appeals support the decision of that Board.

Petitioner seeking a reversal of that decision has brought the case to this court for review.

SPECIFICATIONS OF ERROR

1. The Board erred in holding that all of said petitioner's distributive share of the income of Rucker Brothers for 1918 was the separate income of petitioner.

2. The Board erred in failing to hold that all of said petitioner's distributive share of the income of Rucker Brothers for 1918 was the community property of said petitioner and his wife.

3. The Board erred in its conclusions.

Transcript of Record p. 21.

ARGUMENT

As the different specifications of error raise the same question they may all be discussed together.

No question of fact is involved in this proceeding. The petitioner accepts the facts as found by the Board of Tax Appeals. But he urges that the conclusions drawn from these facts by the Board of Tax Appeals are erroneous.

The question involved is the proper construction of the community property statutes of the State of Washington.

The statutes pertinent to the inquiry are as follows:

Section 6890 of Remington's Compiled Statutes: Property and pecuniary rights owned by the husband before marriage, and that acquired by him afterward by gift, bequest, devise or descent, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of his wife, and he may manage, lease, sell, convey, encumber or devise by will, such property without the wife joining in such management, alienation, or encumbrance, as fully and to the same effect as though he were unmarried.

Section 6891: The property and pecuniary rights of every married woman at the time of her marriage, or afterward acquired by gift, devise, or in-

heritance, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of her husband, and she may manage, lease, sell, convey, encumber or devise by will such property, to the same extent and in the same manner that her husband can, property belonging to him.

Section 6892: Property, not acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof.

Sections 6890 and 6891 define separate property and Section 6892 provides that all property not acquired or owned as prescribed by the next two preceding sections acquired after marriage shall be community property.

The profits were made from timber bought on credit during the existence of the marriage community of petitioner and his wife.

23.)

Notes were given to evidence this indebtedness, signed by W. J. and B. J. Rucker for Rucker Bros. (*Transcript*, p. 14).

From these facts the appellants contend that all of the income reported by the said B. J. Rucker and wife was bonafide community income and was properly reported one-half as the income of B. J. Rucker and one-half as the income of his wife, Ruby Rucker.

It is the well established rule that the Federal Courts follow the State Courts in the construction of State Statutes.

> "Decisions by the court of last resort of a state construing state laws, on the faith of which a subsequent contract is made, will be adopted and applied by the Supreme Court of the United States in considering the nature of the contract right relied upon.
>
> "State decisions establishing a rule of property will be followed by the Supreme Court of the United States when called upon to interpret the state law, if it is possible to do so.
>
> "The community system of property was not destroyed, so as to make it impossible for community or common property to exist, by Wash. act 1893, giving the administration and disposition of the community property to the husband."
>
> *Warburton v. White,* 176 U. S. 484, 44 Law Ed. 555.

Under the laws of the State of Washington as construed by the Supreme Court the following legal conclusions are firmly established.

1. That all property acquired by husband and

wife or either of them during marriage is presumed to be community property and the burden of proof is on the person claiming the same to be separate property.

2. The property acquired by husband and wife or either of them during the marriage relation on borrowed capital is community property.

3. That separate property of either husband or wife so mixed or intermingled with the community as to be incapable of accurate segregation becomes community property.

4. That the rents, issues and profits of community property and the earnings of the husband, and of the wife while living with the husband, is community property and of course community income.

The first proposition is sustained by an unbroken line of decisions from

Lemon vs. Watterman, 2 W. T. 485.
To Marston vs. Rue, 92 Wash. 129.

The following authorities sustain the second proposition.

Yesler vs. Hochstettler, 4 Wash. 349.
Main vs. Scholl, 20 Wash. 205.
Fielding vs. Ketler, 86 Wash. 194.
Graves vs. Columbia Underwriters, 83 Wash. 198.

As to the third proposition the finding of fact is as follows:

"Rucker has kept no record of the property he had at the time he was married nor of what he has accumulated subsequently to marriage."

(*Transcript p.* 14).

"In regard to the money in the bank, it is impossible to segregate that as to its sources. Its separate and community natures have become so confused that the court cannot apportion them, and the favor with which community property is regarded and the presumptions in favor of it are such that we must agree with trial court that these funds in bank are the property of the community and not subject to the appellant's judgment."

119 Wash. 287, *Jacobs vs. Hoitt.*

"So we have held that, where separate funds have been so commingled with the community funds as to make it impossible to trace the former or tell which are separate and which are community funds, all funds or property into which they have been invested belong to the community. Yesler vs. Hochstettler, 4 Wash. 349, 30 Pac. 398; Doyle vs. Langdon, 80 Wash. 175, 141 Pac. 352; In re Buchanan's Estate, 89 Wash. 172, 154 Pac. 129. Such is the situation here and we hold that the money and the property into which it was vested belonged to the community."

In re estate of Carmack, 133 Wash. 374.

"When either spouse claims that his separate property has been commingled with community funds he must support by affirmative proof his claim to distinct articles or parcels or to a share of some mass or parcel, or he must fail."

McKay on Community Property, Sec. 323 (Sec. Ed.)

As to the fourth proposition:

"Property acquired by either spouse during the coverture, otherwise than by gift, bequest, devise or descent, is presumptively community property."

Union Sav. & Trust Co., vs. Manney, 101 Wash. 279.

"It is conceded that the property in dispute was acquired and improved by community funds *earned* after marriage. The statute makes such property community property."

In re Parker's estate, 115 Wash. 60.

The interest of petitioner in this timber, under an unbroken line of decisions, was the community property of himself and wife and any profit realized therefrom was community income of petitioner and wife.

The decision of the Board of Tax Appeals on this branch of the case is based solely on the decision of the Supreme Court of the State of Washington, In re: *Brown estate*, 124 Wash. 273. The Brown case was decided on the authority of *Jacobs vs. Hoitt* 119 Wash. 283 and *Finn vs. Finn*, 106 Wash. 137. In both of these cases the facts were entirely different from the facts of the case at bar In *Finn* vs. Finn the property was purchased and partly paid for by the wife with separate funds and the balance secured by a joint note and mortgage upon her separate property. These facts were held to

overthrow the presumption of community property even though the property was acquired during the marriage relation.

In *Jacobs vs. Hoitt* the holding of the court was that the status of the bakery plant and business acquired before marriage by the use of separate funds and the pledging of separate credit is separate property. In that case Mr. Jacobs signed the note in question before his marriage.

In the case at bar, Mr. Rucker signed the note some 10 to 15 years after his marriage, and a note signed by the husband during the existence of the marriage relation is presumptively an obligation of the community.

> "Where a promissory note is executed by the husband as principal, it raises a presumption in favor of the community character of the debt."
>
> *Reed vs. Loney*, 22 Wash. 433.
> *Way vs. Lyric Theatre Co.*, 79 Wash. 275.
> *Peter vs. Hansen*, 86 Wash. 413.
> *Horton vs. D. K. Banking Co.*, 15 Wash. 399.

SUMMARY

Under the Statutes of the State of Washington, as construed by the Supreme Court of that State, the profits realized on this timber was community property.

The Federal Courts as above shown will follow

the construction placed upon State Statutes by the highest court of the State. The authorities relied upon the Board in rendering the decision adverse to petitioner do not support the conclusion placed upon them by the Board.

The cases relied upon by the Board were decided upon an entirely different state of facts than exist in the case at bar.

The decision is manifestly erroneous and therefore should be reversed.

Respectfully submitted,

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Attorneys for Petitioner.

Nos. 5662 and 5663

In the United States Circuit Court of Appeals for the Ninth Circuit

B. J. RUCKER, PETITIONER

v.

DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE

B. J. RUCKER, PETITIONER

v.

DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE

ON PETITION TO REVIEW THE DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR RESPONDENT

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 5662

B. J. RUCKER, PETITIONER

v.

DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE

No. 5663

B. J. RUCKER, PETITIONER

v.

DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE

ON PETITION TO REVIEW THE DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR RESPONDENT[1]

PREVIOUS OPINION

The only previous opinion in each case is that of the United States Board of Tax Appeals (Cause

[1] The facts and issues of law in both Cause No. 5662 and Cause No. 5663 being in substance the same, respondent's position is brought to the attention of the court in the one brief.

No. 5662, R. 11–17, and Cause No. 5663, R. 17–29) reported in 9 B. T. A. 921 and 9 B. T. A. 915, respectively.

JURISDICTION

The appeals in the above-entitled causes involve income tax for the calendar years 1918 and 1919 (Cause No. 5662, R. 4, 6, 7; Cause No. 5663, R. 4, 12–15), and are taken from final orders of the United States Board of Tax Appeals, entered March 20, 1928 (Cause No. 5662, R. 18–19; Cause No. 5663, R. 30). The cases are brought to this court by petitions for review, filed October 4, 1928 (Cause No. 5662, R. 20–22; Cause No. 5663, R. 31–34) pursuant to the Revenue Act of 1926 (Act of February 26, 1926, c. 27, Sections 1001, 1002, and 1003, 44 Stat. 9, 109, 110).

QUESTION PRESENTED

Did the distributive share of B. J. Rucker of the profits of the partnership of Rucker Brothers, during the years 1918 and 1919, constitute separate income, taxable in its entirety to Rucker, or did it constitute community property, taxable one-half to B. J. Rucker and one-half to his wife?

STATUTES INVOLVED

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1152:

PART II.—INDIVIDUALS

NORMAL TAX

SEC. 210. That, * * * there shall be levied, collected, and paid for each taxable

year upon the net income of every individual a normal tax * * *;

* * * * *

SURTAX

SEC. 211. (a) That, * * * there shall be levied, collected, and paid for each taxable year upon the net income of every individual, a surtax * * *.

Revenue Act of 1926 (Act of February 26, 1926), c. 27, 44 Stat. 9, 109—

COMMUNITY PROPERTY

SEC. 1212. Income for any period before January 1, 1925, of a marital community in the income of which the wife has a vested interest as distinguished from an expectancy, shall be held to be correctly returned if returned by the spouse to whom the income belonged under the State law applicable to such marital community for such period. Any spouse who elected so to return such income shall not be entitled to any credit or refund on the ground that such income should have been returned by the other spouse.

STATEMENT OF FACTS

The facts are as follows:

B. J. Rucker, the petitioner, was married in December, 1904, and he has lived continuously with his wife since that time. At the time of his marriage, Rucker owned a one-half interest in the copartnership of Rucker Brothers, the assets of

which consisted of lands and town lots and some shares of stock in the Rucker Bank. Rucker Brothers were engaged in the real-estate business at the time of Rucker's marriage, but in 1907 or 1908 the firm entered into the logging and sawmill business. The lands and town lots owned by the partnership at the time of Rucker's marriage were nonproductive properties from which there has been no income from the time of his marriage to the present time. (Cause No. 5662, R. 13–14; Cause No. 5663, R. 22.)

The profits earned by the partnership of Rucker Brothers have come from enterprises that they have been engaged in, such as timber and sawmill and logging operations, for which the firm borrowed money and started. They have bought most of their timber on the installment plan, making only a small initial payment therefor. (Cause No. 5662, R. 14; Cause No. 5663, R. 22–23.)

Rucker has kept no record of the property he had at the time he was married, nor of what he has accumulated subsequently to marriage. (Cause No. 5662, R. 14; Cause No. 5663, R. 23.)

Rucker Brothers purchased a quantity of timber from the Puget Mill Company in 1917, at a total purchase price of $625,000, for which they paid $5,000 in cash, and the balance of $620,000 in promissory notes, extending over a period of several years, all of which notes were signed by W. J. and B. J. Rucker, for the partnership. A portion of that timber was later sold at a profit of upwards of

$80,000. The portion of that timber that was not sold was cut and sawed at their own mill and paid for as it was cut and removed. (Cause No. 5662, R. 14; Cause No. 5663, R. 23.)

During the period 1907 to 1916 the firm of Rucker Brothers borrowed several sums of money for use in the partnership. (Cause No. 5662, R. 14; Cause No. 5663, R. 23.)

All of Rucker's property at the time of his marriage was his equity in the partnership, and all of his income has been from the partnership distributions. (Cause No. 5662, R. 14; Cause No. 5663, R. 23.)

Rucker Brothers filed an amended partnership return for the year 1918, showing therein $95,699.27 as the total distributive income of the partnership for that year, divided $47,849.64 and $47,849.63 for W. J. and B. J. Rucker, respectively. (Cause No. 5662, R. 15.)

Losses on the dissolution of the corporation Tulalip Company, owned entirely by the partnership, Rucker Brothers, deducted from the distributive income, left a net taxable income reported by B. J. Rucker of $36,623.32. (Cause No. 5662, R. 15.)

The respondent determined the net income of B. J. Rucker to be $47,599.90. (Cause No. 5662, R. 15.)

The Board of Tax Appeals allowed the deduction taken and the Commissioner of Internal Revenue

has acquiesced in the Board's decision. (Cause No. 5662, R. 15–17; Int. Rev. Bul. VII, 29–3801.)

B. J. Rucker filed an individual income tax return for the year 1919 on March 15, 1920, showing therein as his share of the partnership distribution $62,-741.12, and in addition, salary received from the partnership, of $9,000, making a total net income reported of $71,741.12. (Cause No. 5663, R. 23.)

Mrs. B. J. Rucker filed an individual income tax return for the year 1919, on May 5, 1921, reporting $35,870.56, being one-half of the total income reported by Rucker in his original return. On May 5, 1921, Rucker himself filed an amended individual income tax return, showing therein one-half of the total net income reported by him in his individual return, or $35,870.56. (Cause No. 5663, R. 23–24.)

The parties agreed upon the disputed additions to income and deductions taken, by written stipulation. (Cause No. 5663, R. 19–22.)

The sole question remaining for determination by the Board, in both causes, was whether the Commissioner correctly held that the entire distributive share of B. J. Rucker, in the partnership of Rucker Brothers, was separate property, or whether said share was community income, under the laws of the State of Washington. The Board upheld the Commissioner's determination.

The petitioner, in both causes, has concurred in all of the findings of fact promulgated by the Board, contending only that the Board erred in its conclu-

sions. (Cause No. 5662, R. 21; Cause No. 5663, R. 33.)

SUMMARY OF ARGUMENT

The entire distributive share of the income of B. J. Rucker, in the partnership of Rucker Brothers for the years 1918 and 1919, constituted separate income and hence is taxable to him.

ARGUMENT

The entire distributive share of the income of B. J. Rucker in the partnership of Rucker Brothers for the years 1918 and 1919 constituted separate income and hence is taxable to him

Section 1212 of the Revenue Act of 1926, *supra,* provides in part that—

> Income for any period before January 1, 1925, of a marital community in the income of which the wife has a vested interest as distinguished from an expectancy, shall be held to be correctly returned if returned by the spouse to whom the income belonged under the State law applicable to such marital community for such period.

The respective rights of husband and wife in the community property of the State of Washington are defined by the following sections of Remington's Compiled Statutes of Washington, 1922:

> SEC. 6890. Property and pecuniary rights owned by the husband before marriage, and that acquired by him afterwards by gift, bequest, devise or descent, with the rents, issues, and profits thereof, shall not be subject

to the debts or contracts of his wife, and he may manage, lease, sell, convey, encumber, or devise, by will, such property without the wife joining in such management, alienation, or encumbrance, as fully and to the same effect as though he were unmarried.

SEC. 6891. The property and pecuniary rights of every married woman at the time of her marriage, or afterwards acquired by gift, devise, or inheritance, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of her husband, and she may manage, lease, sell, convey, encumber or devise by will such property, to the same extent and in the same manner that her husband can, property belonging to him.

SEC. 6892. Property, not acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof.

Stated in summary, these statutes provide that the "property and pecuniary rights" of the husband and wife, owned by them at the time of marriage, together "with the rents, issues, and profits thereof" constitute their separate property, and the property acquired after the marriage, with certain specified exceptions, is community property.

In construing the above-quoted sections, the courts of Washington have held, and it is now the law in that State, that the wife has during coverture, as well as upon the dissolution of the marriage, a vested and definite interest and title in community property, equal in all respects to the interest and title of her husband therein. *Opinion of Attorney General,* March 3, 1921, T. D. 3138, 4 C. B. 238; *Holyoke* v. *Jackson,* 3 Pac. 841 (3 Wash. T. 235); *Mabie* v. *Whittaker,* 39 Pac. 172 (10 Wash. 656); *Marston* v. *Rue,* 159 Pac. 111 (92 Wash. 129); *Schramm* v. *Steele,* 166 Pac. 634 (97 Wash. 309); *Huyvaerts* v. *Roedtz,* 178 Pac. 801 (105 Wash. 657).

Washington is therefore one of the community property States, within the provisions of Section 1212 of the Revenue Act of 1926, *supra,* in which the husband and wife may each report one-half of the community income. There then remains only the question of determining whether the distributive share of B. J. Rucker of the partnership profits for 1918 and 1919 was separate property or community property.

The courts of Washington have handed down a vast number of decisions with respect to community property, from which it is possible to establish definite rules for the determination of the status, in that State, of the income under consideration. Certain of the rules pertinent to the discussion herein are contained in the decision of the Supreme Court of the State of Washington in the case of *In re*

Brown's Estate, 214 Pac. 10, 11 (124 Wash. 273). These rules are:

> 1. The presumption is that property acquired during coverture is community property * * *; and the burden is upon the person claiming it to be separate property to establish that as its character. (Citing case.)
>
> 2. The status of the property is to be determined as of the date of its acquisition. * * *. This rule is equally true with regard to personal property as with real property. (Citing case.)
>
> 3. If property is once shown to have been separate property, the presumption continues that it is separate until overcome by evidence. * * *.
>
> Separate property continues to be separate through all its changes and transitions so long as it can be clearly traced and identified. (Citing cases.)
>
> 4. The rents, issues, and profits of separate property remain separate property and profits resulting from money borrowed on separate credit are separate property. (Citing cases.)
>
> 5. Separate property may lose its identity as such by being consolidated with community property. * * *

In that case, the court found that certain items of the estate were community property, but that the increased value in the stock of the Klale Investment Company and its obligations to Brown's Estate constituted separate property, the stock having been

purchased from funds which were separate property, and the profits of the company having resulted from that original investment, together with money borrowed on the strength of Brown's separate credit.

The instant case is quite analogous. Applying the principles above set forth to the facts found by the Board, which findings have been concurred in by petitioner, it must be concluded that the income derived from the partnership distributions is to be attributed primarily to separate property.

The income in question was acquired during coverture, so that it is presumed to be community property. This presumption, however, is rebuttable. *Lemon* v. *Waterman,* 7 Pac. 899 (2 Wash. T. 485); *Weymouth* v. *Sawtelle,* 44 Pac. 109 (14 Wash. 32); *Dobbins* v. *Dexter Horton & Co.,* 113 Pac. 1088 (62 Wash. 423).

In referring to this presumption, the court, in *Weymouth* v. *Sawtelle, supra,* in no uncertain language says (14 Wash. 32, 33):

> * * * but this presumption under our law is a disputable, and not a conclusive, presumption.

In the instant case the facts are:

At the time of his marriage, Rucker owned a one-half interest in the copartnership of Rucker Brothers. (Cause No. 5662, R. 13; Cause No. 5663, R. 22.) All of Rucker's property at the time of his marriage was his equity in the partnership and all

of his income has been from the partnership distributions. (Cause No. 5662, R. 14; Cause No. 5663, R. 23.) He also received from the partnership a salary of $9,000. (Cause No. 5663, R. 23.) The salary so received is not here under consideration.

The partnership interest of Rucker is unquestionably separate property, it having been acquired prior to his marriage. The status of property is determined and fixed at the date of its acquisition. (*Rule 2, in re Brown's Estate, supra; Katterhagen* v. *Meister,* 134 Pac. 673 (75 Wash. 112).) If property is once shown to have been separate property the presumption continues that it is separate until overcome by evidence. *Guye* v. *Guye,* 115 Pac. 731 (63 Wash. 340). Separate property continues to be separate property through all its changes and transitions, so long as it can be clearly traced and identified. *Denny* v. *Schwabacher,* 104 Pac. 137 (54 Wash. 689); *In re Deschamps' Estate,* 137 Pac. 1009 (77 Wash. 514); *Dart* v. *McDonald,* 195 Pac. 253 (114 Wash. 448); *Merrick* v. *Appenzeller,* 196 Pac. 629 (115 Wash. 181); *Rule 3, In re Brown's Estate, supra.*

Rule 4, quoted above, provides:

> The rents, issues, and profits of separate property remain separate property and profits resulting from money borrowed on separate credit are separate property.

The partnership properties held at the time of Rucker's marriage were nonproductive and played

no part in the production of the partnership's income under consideration. There is no evidence with respect to the other partnership assets as of that date.

The profits earned by the partnership of Rucker Brothers have come from enterprises they have engaged in, such as timber and saw-mill and logging operations (begun in 1907 or 1908), for which the firm borrowed money and started. They (the firm) bought most of their timber on the installment plan, making only a small initial payment therefor. (Cause No. 5662, R. 13–14; Cause No. 5663, R. 22–23.)

In 1917 Rucker Brothers purchased a large tract of timber for $625,000, paying only $5,000 in cash, and giving promissory notes for the balance. These notes were signed by W. J. and B. J. Rucker for (and in the name of) the partnership. (Cause No. 5662, R. 14; Cause No. 5663, R. 23.)

During the period 1907 to 1916, the firm of Rucker Brothers borrowed several sums of money for use in the partnership. (Cause No. 5662, R. 14; Cause No. 5663, R. 23.)

All of Rucker's property at the time of his marriage having been his equity in the partnership, and this being his separate property, there being no evidence of any community property nor of separate property belonging to Mrs. Rucker, during the years 1918 and 1919, it must be concluded that the money borrowed by the firm was borrowed

on separate credit. Profits resulting from money borrowed on separate credit constitutes separate property. *Finn* v. *Finn,* 179 Pac. 103 (106 Wash. 137); *Jacobs* v. *Hoitt,* 205 Pac. 414 (119 Wash. 283); See also *United States Fidelity & Guaranty Co.* v. *Lee,* 107 Pac. 870 (58 Wash. 16).

The distributive share of Rucker in the partnership profits resulted, certainly for the most part, from the separate property. This is evidenced by the fact that Rucker received the very substantial salary of $9,000, which it is reasonable to assume, and the Board so assumed, was the value placed by the partnership upon Rucker's services on behalf of the community.

Where business income is produced in part by separate property and in part by the funds or efforts of the community, and each of these two factors is substantial, the court will attempt to allocate such earnings, but if it appears that income is to be attributed primarily to one element, the other element may be disregarded. *In re Buchanan's Estate,* 154 Pac. 129 (89 Wash. 172); *Jacobs* v. *Hoitt, supra.*

This rule is the proper one to apply for income tax purposes. *Appeal of Julius and Rebecca Shafer,* 2 B. T. A. 640.

The distributive share of B. J. Rucker, in the partnership profits, for the years 1918 and 1919, was the separate property of Rucker; hence was properly taxable to him.

The petitioner, at pages 7 and 8 of his brief, has correctly stated certain legal conclusions as having been firmly established by the Supreme Court of the State of Washington, and has applied them to the facts in the instant case. These conclusions, though correctly stated, in so far as they go, do not, however, go far enough to permit of their application or are in no way applicable to the facts in the instant case.

> Conclusion 2. The property acquired by husband and wife or either of them during the marriage relation on borrowed capital is community property.

The rule is the proper one in cases in which the money borrowed is for the benefit of, or will benefit, the community. It is not applicable to cases in which the money is borrowed for the sole benefit of separate property. *Main* v. *Scholl,* 54 Pac. 1125 (20 Wash. 205) ; *Graves* v. *Columbia Underwriters,* 160 Pac. 436 (93 Wash. 196).

> Conclusion 3. That separate property of either husband or wife so mixed or intermingled with the community as to be incapable of accurate segregation becomes community property.

This is the correct rule, where there is a commingling of separate and community property. In the instant case, there is no such commingling of property. Rucker's only property, at the time of his marriage, was his equity in the partnership.

The income under consideration was a distribution of the profits of that partnership. Nowhere does it appear that any community property was in any way intermingled. The fact that Rucker has kept no record of his separate property prior to the marriage and the community property subsequently acquired, does not affect the case. The cases cited by petitioner deal with bank balances, which could not be divided into separate and community property, or with situations in which it was clearly impossible to trace the property. We have here no such difficulty. The only property involved was at all times separate property and the "rents, issues, and profits" of separate property constitute separate property.

> Conclusion 4. That the rents, issues and profits of community property and the earnings of the husband, and of the wife while living with the husband, is community property and of course community income.

This conclusion assumes that the property was community property to start with, whereas it has been shown in the instant case that the property was separate property. It is therefore inapplicable to this case.

CONCLUSION

The distributive share of B. J. Rucker, of the partnership profits of Rucker Brothers, for the years 1918 and 1919, was Rucker's separate property and hence is taxable to him. Wherefore, it is

respectfully submitted that the decision of the United States Board of Tax Appeals should be affirmed.

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The above brief was prepared by the Bureau of Internal Revenue, and states its position. This view is not concurred in by the Department of Justice. Error is not confessed as there is decided difference of opinion as to the correct conclusion, and also because the Bureau of Internal Revenue believes the case to be of sufficient importance to warrant establishing a precedent by which the Board of Tax Appeals may guide itself.

It is believed by this Department that the following more nearly represents a correct application of the law to the facts:

The decision of the Board of Tax Appeals and the preceding argument have largely rested upon the rules laid down by the Supreme Court of the State of Washington in the case of *In re Brown's Estate,* 124 Wash. 273 (214 Pac. 10) as defining the law of the State of Washington in regard to community or separate property.

It is suggested as a primary proposition that these rules can not be construed separately or

strictly. Particularly are they modified by the sense in which they are used in the case setting them forth.

The facts in the *Brown case* are that at the time of decedent's marriage (1902) he owned property valued at $70,000. Upon the sale of this property he acquired stock in the Semper-Klale Investment Company and in the Case Shingle Company. He sold the stock in these last two mentioned companies and with the proceeds bought stock in the Le Bamm Mill Company. At his death his estate consisted of (1) real estate, (2) bank certificates, (3) cash, (4) life insurance, (5) liberty bonds, and (6) a note acquired after coverture and six other items of stock, open accounts and notes arising out of the Semper-Klale Investment Company or Le Bamm Mill Company. The wife claimed the entire estate to be community property and the executors claimed it to be separate property. The court, after laying down the rule hereinafter adverted to, says (124 Wash. 273, 277):

> In relation to items 1, 2, 3, 5, and 6, the testimony shows that all this property was acquired during coverture, and *there is an absence of proof concerning its origin or the source of the money with which it was procured.* The presumption therefore attaches that it is community property, * * *. (Italics supplied.) In regard to item 4, being the proceeds of a life insurance policy, payable to the estate, no proof was introduced and the presumption must be conclu-

> sive that it is community property. As was said in *Succession of Buddig,* 108 La. 406, 32 South. 361:
>
> "* * * He has no right to transact so as to build up a separate estate to the disadvantage of the community. As to him, primarily all the property belongs to the community * * *."

The court, *finding the other assets to be directly traceable to the original separate property of the husband,* held them to be still his separate property.

It is submitted that in the instant case there is no item of property as to which there is more positive identification than the items numbered 1 to 6 which were determined to be community property in the *Brown case, supra.* The Board of Tax Appeals says (Opinion, R. 28):[2]

> * * * The fact that the partnership interest was separate property, "the presumption continues that it is separate until overcome by evidence" and it "continues to be separate through all its changes and transitions, so long as it can be clearly traced and identified." There is no doubt that the property in question can be clearly traced and identified.

This conclusion seems to take considerable for granted. It is believed that a reference to the facts will make this clear. At the time of petitioner's marriage, it is shown that the partnership

[2] The records in cases 5662 and 5663 are practically identical and the references in this part of the brief will be only to Case No. 5663.

owned only two kinds of property: (a) certain real estate. This property is still owned and from it the partnership has received no income. (R. 22.) Thus it may be disregarded for the present purposes. (b) "Some shares of stock in the Rucker Bank." (R. 22.) The number or original or present value of these shares is nowhere shown. Nor is it shown whether these shares are still in the hands of petitioner or that they have ever yielded any income. As this is the only other property belonging to the partnership or to petitioner individually at the time of his marriage, it is apparent that from it must come the property which he now asserts to be community property in order to sustain the position urged by the Bureau of Internal Revenue.

An application of the rules laid down in the *Brown case* and relied upon by the Board of Tax Appeals will demonstrate the impossibility of tracing these shares of stock to the present property of petitioner.

> Rule 1. The presumption is that property acquired during coverture is community property * * *; and the burden is upon the person claiming it to be separate property to establish that as its character.

At the outset it may be noted and emphasized that all of these rules refer to specific property. The record shows that in 1907 or 1908 the partnership engaged in the logging and saw-mill business. From this business all its profits have been made. (R. 22–23.) Applying this rule to these facts, it

would seem clear that the property purchased by the partnership is presumed to be community property, and that the burden must rest on the respondent to show it to have been separate property. The record is silent as to any connection between any of this property acquired by the partnership in the pursuance of its timber business and the shares of stock of the Rucker Bank. Not only is this true but the record shows that the custom of the business was to buy "timber on the installment plan, making only a small initial payment therefor." (R. 23.) See *Plath* v. *Mullins,* 87 Wash. 403 (151 Pac. 811); *In re Slocum's Estate,* 83 Wash. 158 (145 Pac. 204); *Patterson* v. *Bowes,* 78 Wash. 476 (139 Pac. 225). See also discussion under Rule 4, hereafter.

> Rule 2. The status of property is to be determined as of the date of its acquisition. * * *. This rule is equally true with regard to personal property as with real property.

The record shows that the partnership did not engage in the timber and saw-mill business until 1907 or 1908, three or four years after the marriage of petitioner, and that its profits were earned through these businesses. (R. 22–23.) It is also shown that none of the property which is here in question was owned at the time of petitioner's marriage. Consequently, under Rule 2, read in conjunction with Rule 1, it must be that the instant property is community rather than separate.

> Rule 3. If property is once shown to have been separate property, the presumption

> continues that it is separate until overcome by evidence. * * *.
>
> Separate property continues to be separate through all its changes and transitions, so long as it can be clearly traced and identified.

It is freely conceded by all that the shares of stock of the Rucker Bank did, and if still held do, constitute the separate property of petitioner. The record is absolutely silent, though, as to whether or not this property is still held. Beyond this, however, the property here involved has never been shown to have been separate property, nor that it proceeded from separate property. We have only the possible supposition, which is decidedly nebulous, that the original bank stock may have grown until from it flowed all of the property here in question. This supposition is certainly not the clear, certain, and convincing evidence required by the decided cases. *In re Slocum's Estate, supra.* Neither is there in the instant case any attempt made, the Board of Tax Appeals to the contrary notwithstanding, to trace or identify the progress of this bank stock to the property here involved.

> Rule 4. The rents, issues, and profits of separate property remain separate property and profits resulting from money borrowed on separate credit are separate property.

It would seem that this can have little application to the instant case, in that the only separate property shown by this record is not shown to have yielded at any time either rents, issues, or profits.

As to the second part of the rule that "profits resulting from money borrowed on separate credit are separate property," there would seem to be little more appropriateness. The record shows that the partnership bought much timber after petitioner's marriage; that this timber was largely bought on credit. The record does not show that it was bought on the separate credit of the partners, and the presumption is that money borrowed during the existence of the community constitutes a community debt and the yield of such borrowing, community credit. *Lumbermen's National Bank* v. *Gross,* 37 Wash. 18 (79 Pac. 470); *McDonough* v. *Craig,* 10 Wash. 239 (38 Pac. 1034); *Yesler* v. *Hochstettler,* 4 Wash. 349 (30 Pac. 398).

There would seem to be nothing to sustain the contention that partnership property acquired after coverture is to be regarded as separate property of the partners.

It is suggested that the fact of partnership is immaterial in determining the status of properties. *Lumbermen's National Bank* v. *Gross, supra.*

> Rule 5. Separate property may lose its identity as such by being consolidated with community property.

While there is no separate property shown to be involved in the instant case, it is submitted that even though there was such property, it has been so mixed with that acquired by the partnership after marriage of petitioner that under this rule the

separate property, if any there may be, will have now completely lost its identity.

It has been urged on behalf of the Bureau of Internal Revenue that as petitioner received a salary from the partnership, that this salary represents his community worth to the partnership, and that any other profit derived by him through the partnership should be deemed to proceed from his original separate property. It is suggested that this view finds little support in the decided Washington cases. In *Protzman* v. *Billings,* 120 Wash. 123 (206 Pac. 848), it was held that the note of a husband constituted a community debt where it was given for the purchase of shares of stock in a corporation conducted on behalf of the community and from which the husband received a salary. See also *Denis* v. *Metzenbaum,* 124 Wash. 86 (213 Pac. 453).

The brief for the Bureau of Internal Revenue has cited a great many cases. As these cases are not contrary to the spirit of those here cited, a separate consideration is not deemed necessary. Differences arise solely as to the application.

Respectfully submitted.

MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

SEWALL KEY,
Special Assistant to the Attorney General.

JOHN VAUGHAN GRONER,
Special Assistant to the Attorney General.

MARCH, 1929.

○

No. 5663

United States

Circuit Court of Appeals

For the Ninth Circuit.

B. J. RUCKER,

Petitioner,

vs.

DAVID H. BLAIR, Commissioner of Internal Revenue,

Respondent.

Transcript of Record.

UPON PETITION TO REVIEW ORDER OF THE UNITED STATES BOARD OF TAX APPEALS.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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[1*] DOCKET NUMBER 3509.

B. J. RUCKER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

For Taxpayer:

HERBERT E. SMITH, Esq.
W. P. BELL, Esq.
J. B. FOGARTY, Esq.

For Commissioner:

GRANVILLE BORDEN, Esq.

DOCKET ENTRIES.

1925.

Apr. 18—Petition received and filed.

Apr. 23—Copy of petition served on solicitor.

Apr. 23—Notification of receipt mailed taxpayer.

May 13—Answer filed by solicitor.

May 18—Copy of answer served on taxpayer. Assigned Reserve Calendar.

1927.

Apr. 13—Hearing date set 6–14–27 at Seattle, Wash.

June 14—Hearing had before Mr. Morris on merits —consolidated with 3508—Stipulations filed at hearing. Briefs due 9–15–27.

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*Page-number appearing at the top of page of original certified Transcript of Record.

Aug. 9—Transcript of hearing filed 6–14–27.

Aug. 31—Motion for extension to Oct. 15, 1927 to file brief filed by G. C. See 2928.

Sept. 3—Granted to Oct. 15, 1928.

Sept. 8—Brief filed by taxpayer. See 3508.

Sept. 29—Brief and findings filed by G. C.

Nov. 30—Motion that time to file proposed redetermination be set for some date subsequent to 12–20–27, filed by taxpayer. See 2928.

Dec. 27—Findings of fact and opinion rendered (Morris). Judgment will be entered on 15 days' notice under Rule 50.

1928.

Feb. 8—Notice of settlement filed by taxpayer. Copy served on G. C. 2–11–28.

Feb. 10—Notice allowing G. C. until 2–28–28 to file settlement for hearing 3–8–28 failure to do so hearing set 3–6–28.

Feb. 11—Notice of settlement filed by G. C. Copy served 2–15–28.

Mar. 8—Hearing had before Mr. Morris on settlement.

Mar. 15—Transcript of hearing 3–8–28 filed. See 2929.

Mar. 20—Order of redetermination entered.

Sept. 14—Petition for review by U. S. Cir. Ct. of Appeals, 9th Cir., with assignments of error filed by taxpayer.

Sept. 14—Proof of service filed.

Oct. 4—Praecipe of record filed.

Oct. 4—Proof of service filed by taxpayer.

Now, October 31, 1928, the foregoing docket entries certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[2] Filed Apr. 18, 1925. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 3509.

Appeal of B. J. RUCKER, of Lake Stevens, Wash.

PETITION.

The above-named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter (IT:CR:-G–6 60D, GJG.) dated February 27, 1925, and as a basis of his appeal sets forth the following:

1.

The taxpayer is an individual, and a partner in the copartnership of Rucker Bros., Lake Stevens, Washington, which is composed of said taxpayer and his brother, W. J. Rucker of Lake Stevens, Washington, each owning a one-half interest in said copartnership.

2.

The deficiency letter (a copy of which is attached) was mailed to the taxpayer on February 27, 1925, and states a deficiency of $24,276.97.

3.

The taxes in controversy are income taxes for the calendar year 1919 and are more than $10,000 to wit, $24,276.97.

4.

The determination of the tax is based on the following errors:

(Note—The additional assessment as computed by the Commissioner is based upon audits of the returns of B. J. Rucker and Rucker Bros. (a copartnership) made by an agent of the Bureau of Internal Revenue. The errors here to be stated appear in the report of the audit of Rucker Bros. (a copartnership) (No. 3049–W, IT:EN:T–ATW.) dated November 3, 1924, and signed by F. H. Goudy, Supervising Internal Revenue Agent).

[3]

ERROR #1—The Commissioner has added to the income of the partnership $13,805.10 "Inventory Wire Rope at Camps" (Schedule 1, Items (c) (j) and (k) of above mentioned report).

ERROR #2—The Commissioner has added to the income of the partnership $11,143.19 "Stumpage Disallowed Camp Boulder" (Schedule 1, Item f, of above mentioned report). The amount should be $9,853.59.

ERROR #3—The Commissioner has added to the income of the partnership $12,-

149.29 "Stumpage Disallowed Camp Silverton" (Schedule 1, item h of above mentioned report). The amount should be $11,954.84.

ERROR #4—The Commissioner has added to the income of the partnership $22.55 "Stumpage Disallowed Camp Cavano" (Schedule 1, Item n, of above mentioned report). The amount should be $19.10.

ERROR #5—The Commissioner has added to the income of the partnership $2,-704.67 "Loss — Sale of Bank Stock" and $905.33 "Loss Sale of Bonds" (Schedule 1, items q and r respectively of above mentioned report).

ERROR #6—The Commissioner has added to the income of the partnership $4,-467.20 "Panther Lake Contracts 1 and 2 Profits" (Schedule 1 item s of above mentioned report). This should be a deduction of $131.17 from income.

ERROR #7—The Commissioner has added to the income of the partnership $2,-633.50 "Supply Inventories" (Schedule 1, item x, of above mentioned report).

ERROR #8—The Commissioner has deducted from the income of the partnership $73.60 "Miscellaneous" which is interest paid (Schedule 1, Item a, m, of above mentioned report). This should be $673.60.

ERROR #9—The Commissioner has computed the tax on the entire distributive share of B. J. Rucker in the income of Rucker Bros. (a partnership).

5.

The facts upon which the taxpayer relies as the basis of his appeal are as follows:

FACTS RE ERROR #1.

The Commissioner's report (Schedule 1, Items c j k, pages [4] 3 and 7) states that an analysis of the cost of operating at this camp discloses the fact that these inventories were not reflected as a credit to these costs. This statement is entirely erroneous. The records show that $13,805.10 was credited to operating accounts.

FACTS RE ERROR #2.

Stumpage disallowed Camp Boulder was $11,-143.19. Stumpage on Logs Cut at Camp Boulder during 1919 was—

Entered in return as	3,457,398 Feet	.$19,015.69
Should be	3,457,398 Feet @ 2.65	9,162.10

Correct amount of Stumpage Disallowance ..... $ 9,853.59

FACTS RE ERROR #3.

Stumpage disallowed Camp Silverton was $12,-149.29. Stumpage on Logs Cut at Camp Silverton during 1919 was—

Entered in return as	2,862,886 Feet	$15,745.87
Should be	2,862,886 Feet @ 1,324.	3,791.03

Correct amount of Stumpage Disallowance $11,954.84

FACTS RE ERROR #4.

Stumpage disallowed Camp Cavano was $22.50. Stumpage on Logs Cut at Camp Cavano during 1919 was—

Entered in return as	6,700 Feet	$ 36.85
Should be	6,700 Feet @ 2.65	17.75

Correct amount of stumpage Disallowance $19.10

FACTS RE ERROR #5.

Loss on Sales of Bank Stocks and Bonds—

This stock cost Rucker Bros..... $9,400.00

The bank owed Rucker Bros. a balance which was written off as part of the transaction amounting to 368.30

Rucker Bros. paid to the Bank the difference between the cost and market value of certain bonds, also as part of this sale	905.33
Carried forward	$10,673.63

[5]

Brought Forward	$10,673.63
Rucker Bros. received in cash	6,063.63
Leaving a balance of	$ 4,610.00
The Commissioner allowed a deduction on account of attorney's services of	1,000.00
Leaving a further deduction improperly disallowed of	$3,610.00

Item (q)	2,704.67
Item (r)	905.33
	3,610.00

FACTS RE ERROR #6.

The Commissioner has added to Income as profit on sales of timber to Panther Lake Company $4,-467.20. The gain is as follows:

	Contract #1	Contract #2
Total proceeds of sale	305,275.00	51,462.50
Total cost	242,721.10	35,580.28
Total Gain	62,553.90	15,882.22

Payments received by Rucker Bros. in 1919	128,000.00	2,500.00
	128,000.	
Profit realized 305,275. of $62,553.90 on Contract #1		26,228.48
	2,500.00	
Profit realized 51,462.50 of $15,882.22 on Contract #2		771.54
Total profit realized in 1919		27,000.02

There was reported in this year in the returns as filed, $27,131.19, whereas the correct amount of profit which should be allocated to the year 1919 is $27,000.02. Therefore instead of an addition to income there should be a reduction of income of $131.17.

FACTS RE ERROR #7.

Item x Schedule 1 of Commissioner's report adds to income $2,633.50 stating that Supply Inventories were not credited to cost of operations. This is a misstatement of fact. These inventories were credited to cost of operations.

[6]

FACTS RE ERROR #8.

Item (a m) of Schedule 1 of the Commissioner's report shows a deduction from income for interest paid.....73.00

In addition to this amount there was interest paid to—

W. P. Bell 248.95
Northern Pacific Ry. Timber Contract.....351.05

Total deduction for interest from income should be $673.60

These two items were charged to timber account but should have been charged to interest, and therefore an additional deduction should be allowed in the amount of $600.00.

FACTS RE ERROR #9.

During the entire year 1919 B. J. Rucker was a married man living with his wife, Ruby Rucker and said B. J. Rucker had no separate income in the year 1919.

6.

With the exception of Errors #6 and #9, all of the errors alleged in this appeal are questions of fact and not of law, and with respect to Errors #6 and #9, the taxpayer, in support of his appeal, relies upon the following propositions of law:

1. The amount to be reported as income in any year from a sale on the installment plan is that proportion of each payment actually received in that year which the gross profit to be realized when the property is paid for bear to the gross contract price.
2. Under the law and decisions of the courts in the State of Washington, all the property and

all the earnings of either spouse are presumed to be the property and earnings of the marital community, and the burden of proof is on any party claiming that said property or income or any portion thereof is the separate property of one spouse or the other.

WHEREFORE, the taxpayer respectfully prays that this Board may hear and determine his appeal.

(Signed) HERBERT ELLES SMITH.

HERBERT ELLES SMITH, (C. P. A.),
Attorney for the Taxpayer, 1124 White Building,
Seattle, Wash.

[7] State of Washington,
County of Snohomish,—ss.

B. J. Rueker, being duly sworn, says that he is the taxpayer named in the foregoing petition; that he has read the said petition, or had the same read to him, and is familiar with the statements therein contained, and that the facts therein stated are true, except such facts as are stated to be upon information and belief, and those facts he believes to be true.

[Seal] (Signed) B. J. RUCKER.

Sworn to before me this 10 day of April, 1925.

(Signed) J. J. SHEEHAN,
Notary Public.

[8] COPY.

February 27, 1925.

IT:CR:G-6.
GJG.
Mr. B. J. Rucker,
Everett, Washington.
Sir:

The determination of your income tax liability for the taxable year 1919 disclosed a deficiency in the tax amounting to $24,276.97. The adjustments made are shown in detail in Revenue Agent's Report dated November 3, 1924, a copy of which has been furnished you.

In accordance with the provisions of Section 274 of the Revenue Act of 1924, you are allowed 60 days from the date of this letter within which to file an appeal to the United States Board of Tax Appeals contesting in whole or in part the correctness of this determination.

Where a taxpayer has been given an opportunity to appeal to the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the enclosed agreement consenting to the

assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:CR:G6–GJG 60D. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,

D. H. BLAIR,
Commissioner.

By J. G. BRIGHT,
Deputy Commissioner.

Enclosures:
Statements
Agreements—Form A.

[9] Due to the fact that the statute of limitations will presently bar any assessment of additional tax against you for the year 1919, the Bureau will be unable to afford you an opportunity under the provisions of Treasury Decision 3616 to discuss your case before mailing formal notice of its determination as provided by Section 274 (a) of the Revenue Act of 1924. It is necessary at this time, in order to protect the interests of the Government, either to make an immediate assessment under the provisions of Section 274 (d) of the Revenue Act of 1924 or to issue a formal notice of deficiency.

[10] IT:CR:G-6.
GJG.

STATEMENT OF RETURNS EXAMINED
and
RESULTING TAX LIABILITY.

Returns Examined:

Name.	Year.	Form.	Date Filed.
B. J. Rucker, Lake Stevens, Washington	1919	1040	March 15, 1920

Tax Liability.

Name.	Year.	Form.	Additional Tax.
B. J. Rucker, Lake Stevens, Washington	1919		$24,276.97

Computation of Tax.

Net Income as disclosed by Revenue Agent's report dated November 3, 1924.....			117,180.40
Less: Specific Exemption.....			2,400.00
Income Subject to Normal Tax.....			114,780.40
4% on $ 4,000.00 equals. $160.00			
8% on 110,780.40 equals. 8,862.43			9,022.43
	Surtax.		
	100,000.00	23,510.00	
	17,180.40	8,933.81	32,443.81
Total Tax			$41,466.24
Less Previously assessed.....			17,189.27
Additional Tax to be assessed			$24,276.97

Now, October 31, 1928, the foregoing petition certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[11] Filed May 13, 1925. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 3509.

In re: Appeal of B. J. RUCKER, Lake Stevens, Washington.

ANSWER.

The Commissioner of Internal Revenue by his attorney A. W. Gregg, Solicitor of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

(1) Admits the allegations contained in paragraphs 1, 2 and 3.

(2) Admits that the Commissioner made the adjustments to taxpayer's income and deduction items as alleged in the petition.

(3) Denies each and every other material allegation of fact contained in the petition.

PROPOSITION OF LAW.

(1) The adjustment made by the Commissioner to taxpayer's income and deduction items for 1919 were proper under the applicable provisions of the Revenue Act of 1918.

(2) Income for 1919 of the taxpayer and his wife has been properly adjusted by the Commissioner.

Wherefore it is prayed that the taxpayer's petition be dismissed and the appeal denied.

A. W. GREGG,
Solicitor of Internal Revenue,

Attorney for Commissioner of Internal Revenue.
Of Counsel:

A. H. FAST,
Special Attorney, Bureau of Internal Revenue.

Now, October 31, 1928, the foregoing answer certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

---

[12] A true copy.

Teste: B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET Nos. 3508 and 3509.

Promulgated December 27, 1927.

W. J. RUCKER,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

B. J. RUCKER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petitioner B. J. Rucker's distributive share of partnership income held to be separate property under the laws of the State of Washington, and therefore taxable to him.

J. B. FOGARTY, Esq., W. P. BELL, Esq., and HERBERT E. SMITH, C. P. A., for the Petitioners.

GRANVILLE S. BORDEN, Esq., for the Respondent.

This is a proceeding for the redetermination of deficiencies in income taxes in the amounts of $24,276.98 and $24,276.97 asserted by the respondent against W. J. Rucker and B. J. Rucker, for the year 1919.

This case came on for hearing on June 14, 1927, at which time, it was on motion of the parties, ordered, that the cases of W. J. Rucker, Docket No. 3508, and B. J. Rucker, Docket No. 3509, be consolidated and heard jointly.

The petition of W. J. Rucker raises eight issues identical with eight of the issues raised by the petition of B. J. Rucker, all of which are as follows:

[13] 1. Whether the respondent erred in add-

ing to the income of the partnership of Rucker Brothers, the sum of $13,805.10, and

2. Whether the respondent erred in adding to income of said partnership the sum of $11,143.19, and

3. Whether the respondent erred in adding to the income of said partnership the sum of $12,-149.29, and

4. Whether the respondent erred in adding to the income of said partnership the sum of $22.55, and

5. Whether the respondent erred in adding to the income of said partnership the sums of $2,-704.67 and $905.33, representing certain losses on the sales of stocks and bonds, and

6. Whether the respondent erred in adding to the income of said partnership the sum of $4,-467.20, and

7. Whether the respondent erred in adding to the income of said partnership the sum of $2,-633.50, and

8. Whether respondent erred in deducting from the income of said partnership the sum of $73.60, instead of the sum of $673.60, and

9. Whether the respondent was in error in computing the tax of B. J. Rucker, a married man, on the entire distributive share of the income of the said partnership.

FINDINGS OF FACT.

The petitioners, W. J. and B. J. Rucker, are brothers, comprising the copartnership operated

under the name of Rucker Brothers, Lake Stevens, Washington.

Each of the petitioners entered into written stipulations with the respondent as follows:

[14] 1.

That the Commissioner of Internal Revenue in determining the net income of the above-named taxpayer for the year 1919, included in said income one-half of the net income of the partnership of Rucker Brothers for the year 1919.

2.

That the Commissioner of Internal Revenue in the 60-day statutory deficiency letter determined the net income of the above-named taxpayer for the year 1919 to be $117,180.40.

3.

Included in the determination of the net income of the above-named taxpayer for the year 1919, there was an amount of $108,345.65 which represented one-half of the net income of Rucker Brothers partnership for the year 1919.

4.

That the Commissioner of Internal Revenue erred in the determination of the net income of Rucker Brothers partnership for the year 1919 by including in income $13,805.10 representing "Inventory Wire Rope at Camps" as alleged in error No. 1 of the taxpayer's petition.

5.

That the Commissioner in the determination of the net income of the partnership of Rucker Broth-

ers for the year 1919, did not err in adding to the income $11,143.19 on account of "Stumpage Disallowed Camp Boulder" as alleged in error No. 2 of the taxpayer's petition.

6.

That the Commissioner of Internal Revenue in the determination of the net income of the partnership of Rucker Brothers for the year 1919 did not err in adding to the income $12,149.29 on account of "Stumpage Disallowed Camp Silverton" as alleged in error No. 3 of the taxpayer's petition.

[15] 7.

That the Commissioner of Internal Revenue in the determination of the net income of Rucker Brothers partnership for the year 1919 erred in the addition to the income of the partnership of $22.55 on account of "Stumpage Disallowed Camp Cavano"; that the correct amount to be added is $19.10; that the income of the partnership of Rucker Brothers for the year 1919 should be decreased by $3.45 on account of this discrepancy as alleged in error No. 4 of the taxpayer's petition.

8.

That the Commissioner of Internal Revenue erred in adding to the income of the partnership of Rucker Brothers for the year 1919, $905.33 on account of "Loss on Sale of Bonds" as alleged in error No. 5 in the taxpayer's petition.

9.

That the loss sustained by Rucker Brothers partnership for the year 1919 on account of "Sale of

Bank Stock" was $704.67; that the Commissioner of Internal Revenue added to the income of the partnership of Rucker Brothers for the year 1919, $2,704.67; that $2,000.00 of the amount of $2,704.67 alleged in error No. 5 of the taxpayer's petition as a loss on the sale of bank stock was properly added to the income of Rucker Brothers partnership for the year 1919 by the Commissioner of Internal Revenue.

10.

That the 60-day statutory deficiency letter reflects profits from the sale of timber to the Panther Lake Company by Rucker Brothers partnership in the year 1919 of $31,598.39; that a correct determination of said profits from said sale of timber is $27,000.02; that the net income of Rucker Brothers partnership for the year 1919 should be decreased by $4,598.37 on account of the adjustment in the determination of the profits from the sale of timber in 1919 to the Panther Lake Company by Rucker Brothers partnership as alleged in Error No. 6 in the taxpayer's petition.

11.

That the Commissioner of Internal Revenue erred in the determination of the income of the partnership of Rucker Brothers partnership for the year 1919 by including $2,633.50 as income on [16] account of "Supply Inventories" as alleged in error No. 7 in the taxpayer's petition.

12.

That the Commissioner of Internal Revenue in the determination of the net income of Rucker

Brothers partnership for the year 1919 deducted from income $73.60 on account of interest paid; that the correct deduction on account of interest paid is $673.60; that the net income of Rucker Brothers partnership for the year 1919 should be decreased $600.00 on account of this discrepancy as alleged in error No. 8 of the taxpayer's petition.

Since the above stipulation disposes of all the allegations of error in the case of W. J. Rucker and since the facts hereinafter recited are with respect to the case of B. J. Rucker, we shall sometimes for convenience, refer to him as Rucker.

B. J. Rucker was married in December, 1904, and he has lived continuously with his wife since that time. At the time of his marriage Rucker owned a one-half interest in the copartnership of Rucker Brothers, the assets of which consisted of lands and town lots and some shares of stock in the Rucker Bank. Rucker Brothers were engaged in the real estate business at the time of Rucker's marriage, but in 1907 or 1908 the firm entered into the logging and sawmill business. The lands and town lots owned by the partnership at the time of Rucker's marriage were nonproductive properties from which there has been no income from the time of his marriage to the present time. In fact they have paid in taxes several times what the property would sell for to-day.

The profits earned by the partnership of Rucker Brothers have come from enterprises they have engaged in, such as timber and sawmill and logging operations for which the firm borrowed money and

started. They [17] have bought most of their timber on the installment plan, making only a small initial payment therefor.

Rucker has kept no record of the property he had at the time he was married, nor of what he has accumulated subsequently to marriage.

Rucker Brothers purchased a quantity of timber from the Puget Mill Company in 1917 at a total purchase price of $625,000 for which they paid $5,000 in cash and the balance of $620,000 in promissory notes extending over a period of several years, all of which notes were signed by W. J. and B. J. Rucker for the partnership. A portion of that timber was later sold at a profit of upward of $80,000. The portion of that timber that was not sold was cut and sawed at their own sawmill and was paid therefor as it was cut and removed.

During the period 1907 to 1916 the firm of Rucker Brothers borrowed several sums of money for use in the partnership.

All of Rucker's property at the time of his marriage was his equity in the partnership and all of his income has been from the partnership distributions.

Rucker filed an individual income tax return for the year 1919 on March 15, 1920, showing therein as his share of the partnership distribution $62,741.12, also salary received from the partnership of $9,000, making a total net income reported of $71,741.12.

Mrs. B. J. Rucker had no separate property in 1919. Mrs. Rucker filed an individual income tax return for the year 1919 on May 5, 1921, reporting

$35,870.56, one-half of the total income reported by Rucker in his original return. On May 5, 1921, Rucker himself filed an amended individual income tax return showing therein one-half of the total net income reported by him in his individual return of $35,870.56.

[18] OPINION.

MORRIS.—All of the issues raised by the petition of W. J. Rucker, Docket No. 3508, and eight of the issues raised by the petition of B. J. Rucker, Docket No. 3509, have been agreed upon and evidenced by written stipulation between the parties set forth herein in the findings of fact and will be settled in accordance therewith.

The sole question remaining for determination is whether the respondent correctly held that the entire distributive share of the income of B. J. Rucker in the partnership of Rucker Brothers was separate property or whether said distributive share was community income under the laws of the State of Washington.

Sections 6890, 6891, and 6892, respectively, of Remington's Compiled Statutes of Washington, 1922, are as follows:

> Property and pecuniary rights owned by the husband before marriage, and that acquired by him afterward by gift, bequest, devise or descent, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of his wife, and he may manage, lease, sell, convey, encumber or devise by will, such property without the wife joining in such manage-

ment, alienation, or encumbrance, as fully and to the same effect as though he were unmarried.

The property and pecuniary rights of every married woman at the time of her marriage, or afterward acquired by gift, devise, or inheritance, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of her husband, and she may manage, lease, sell, convey, encumber or devise by will such property, to the same extent and in the same manner that her husband can, property belonging to him.

Property, not acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof.

[19] Thus it will be seen that under the law of the State of Washington governing the question in controversy the "property and pecuniary" rights of the husband and wife are definitely settled and that "property" owned by them at the time of marriage together "with the rents, issues, and profits thereof" shall be their separate property, and that the property not so owned, but acquired subsequently to marriage with the designated exceptions is "community property."

The testimony reveals that Rucker was a member of the partnership of Rucker Brothers prior to 1904 and that he continued to be a partner up to and during the period in question; that he was married in December, 1904, and has continuously lived with his wife; that all of his income has been derived from salaries of the partnership and partnership distributions.

In the Appeal of Julius and Rebecca B. Shafer, 2 B. T. A. 640, we held that the decisions of the Supreme Court of Washington lay down the rule that where business income was produced in part by separate property and in part by the efforts of the community, and each of these two factors was substantial, the Court will attempt to allocate such earnings, but if it appears that the income is to be attributed primarily to one element, the other element may be disregarded. The Supreme Court of the State of Washington, in the case of Brown's Estate, 214 Pac. 10, has summarized some of the more important rules of the courts of that State for determining the status of community or separate property:

> 1. The presumption is that property acquired during coverture is community property, and the burden is upon the person claiming it to be separate property to establish that as its character.
>
> [20] 2. The status of property is to be determined as of the date of acquisition. This rule is equally true with regard to personal property as with real property.

3. If property is once shown to have been separate property, the presumption continues that it is separate until overcome by evidence. Separate property continues to be separate through all its changes and transitions, so long as it can be clearly traced and identified.

4. The rents, issues, and profits of separate property remain separate property and profits resulting from money borrowed on separate credit are separate property.

5. Separate property may lose its identity as such by being consolidated with community property.

The argument of petitioner's counsel that the distributive share of Rucker in the partnership is from services rather than from property is considerably weakened by the fact that he received a salary of $9,000 for the taxable year, which amount it is reasonable to assume, was the value placed upon his services by the partnership. Of course personal services must necessarily play an important part in the conduct of any business, but where the parties have themselves appraised the value of those services, we could not with the meager amount of evidence before us say that his services were worth any greater amount.

Applying the principles announced in the case of In re Brown's Estate, *supra,* to the instant facts we are led to the conclusion that the income is to be attributed primarily to separate property. There is no question that the interest owned by Rucker in the partnership at the time of his mar-

riage was separate property under the above quoted provisions of the Washington statute. The fact that the partnership interest was separate property, "the presumption continues that it is separate until overcome by evidence" and it "continues to be separate through all its changes and [21] transitions, so long as it can be clearly traced and identified." There is no doubt that the property in question can be clearly traced and identified.

The evidence introduced affecting that presumption was that the only assets owned by the partnership at the time of his marriage consisted of lands and town lots and some shares of Rucker Bank stock, and that such lands and town lots were nonproductive, and were a liability rather than an asset. We are not told anything at all about the value of the bank stock, which for all we know may have been considerable. About 1907 or 1908 the partnership engaged in the sawmill and lumbering business and borrowed the money to establish and carry on that business and continued to borrow money to be used in their operations. In 1917 a large tract of timber was purchased, only $5,000 in cash being paid therefor, the balance of the purchase price being evidenced by promissory notes. These notes were signed by W. J. and B. J. Rucker for, and in the name of Rucker Brothers. Other notes were executed by one or both of them for funds borrowed for the use of the partnership. The profits from these transactions resulted from money borrowed on separate credit and are therefore separate property. In re Brown's Estate, *supra.* In

the Appeal of Julius and Rebecca B. Shafer, *supra,* in which case the income was derived from the sale of merchandise purchased with the separate property of Shafer or on the credit of the partnership, the services rendered being incidental to the profits, we held:

> Upon this basis there can be no presumption that the profits are to be attributed entirely to the services rendered by the community; that presumption has been overcome by the evidence, and if there is now any presumption it would be that this appeal fell within the decision In re Brown's Estate, *supra,* that it was the separate property which was the primary source of the profits.

[22] We are therefore of the opinion that the primary source of the profits in the instant case was Rucker's separate property, and that he is taxable on his distributive share of the partnership income.

Reviewed by the Board.

Judgment will be entered on 15 days' notice under Rule 50.

Now, October 31, 1928, the foregoing findings of fact and opinion certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[23] A true copy:

Teste: B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 3509.

B. J. RUCKER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ORDER OF REDETERMINATION.

Pursuant to the Board's findings of fact and opinion, promulgated December 27, 1927, the parties filed proposed redeterminations which came on for hearing on settlement, March 8, 1928, at which time the proposed redeterminations were taken under advisement. Due consideration having been given thereto, and it appearing that petitioner has failed to compute the deficiency in accordance with our findings of fact and opinion, and the respondent's computation showing the correct tax liability for 1919 to be $34,491.12, the tax previously assessed to be $17,189.27 less $6,583.41 previously allowed, it is

ORDERED AND DECIDED: That, upon redetermination, there is a deficiency of $23,885.26 for 1919.

(Signed) LOGAN MORRIS,
Member, U. S. Board of Tax Appeals.

Entered Mar. 20, 1928.

Now, October 31, 1928, the foregoing order of re-

determination certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[24] Filed Sep. 14, 1928. United States Board of Tax Appeals.

In the United States Circuit Court of Appeals for the Ninth Circuit.

—— Term, 1928.

No. ——.

B. J. RUCKER,

Petitioner,

vs.

DAVID H. BLAIR, Commissioner of Internal Revenue,

Respondent.

PETITION TO REVIEW DECISION OF UNITED STATES BOARD OF TAX APPEALS.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Your petitioner, B. J. Rucker, respectfully represents that he is a resident and citizen of the city of Everett, county of Snohomish, and State of Washington.

I.

NATURE OF CONTROVERSY.

1. On the twenty-seventh day of December, 1927, the United States Board of Tax Appeals promulgated its findings and opinion in the case of B. J. Rucker, Petitioner, vs. David H. Blair, Commissioner of Internal Revenue, respondent, Docket #3509, in which opinion it was held that all of petitioner's distributive share of the income of Rucker Bros. partnership for the year 1919, was petitioner's separate income and no part thereof was community income of said petitioner and his wife, Ruby Rucker.

2. On March 20, 1928, the United States Board of Tax Appeals entered its final order of redetermination of the tax liability of said petitioner for the year 1919, based on said opinion.

II.

ORDER OF REVIEW.

A review of the decision of the United States Board of Tax Appeals in the above-entitled proceeding is sought by the United States Circuit Court of Appeals for the Ninth Circuit.

III.

ASSIGNMENTS OF ERROR.

Your petitioner says that in the record and proceedings of said United States Board of Tax Appeals, in the above-entitled cause and in the final order entered therein, there is manifest error, and for error petitioner assigns the following:

1. The Board erred in holding that all of the said petitioner's distributive share of the income of Rucker Bros. for the year 1919 was the separate income of the petitioner.

[25] 2. The Board erred in failing to hold that all of the said petitioner's distributive share of the income of Rucker Bros. for the year 1919 was community income of the said petitioner and his wife.

3. The said findings of fact promulgated by the Board are concurred in by the petitioner, but the Board erred in its conclusions.

Your petitioner, therefore, prays for review, by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the United States Board of Tax Appeals in the above-entitled case, in accordance with the Act of Congress in such case made and provided, and that the Clerk of said Board be directed to transmit and deliver to the Clerk of said court certified copies of all and every of the documents listed and set forth in the rules adopted by said United States Circuit Court of Appeals for the Ninth Circuit providing for the presentation of petitions for review of decisions.

And he will ever pray, etc.

B. J. RUCKER.

State of Washington,
County of Snohomish,—ss.

Personally appeared before me the subscribed, a notary public in and for said county, B. J. Rucker, petitioner above named, who, being duly sworn according to law, does depose and say that the facts

set forth in the foregoing petition are true and correct.

B. J. RUCKER.

Sworn and subscribed before me this 6th day of Sept., 1928.

W. P. BELL,
Notary Public.

Now, October 31, 1928, the foregoing petition for review certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[26] Filed Oct. 4, 1928. United States Board of Tax Appeals.

Before the United States Board of Tax Appeals.

DOCKET No. 3509.

B. J. RUCKER

vs.

COMMISSIONER OF INTERNAL REVENUE.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare and, within sixty days from the date of the filing of the petition for review in the above-stated case, transmit to the Clerk of the United States Circuit Court of Appeals for

the Ninth Circuit certified copies of the following documents:

1. The docket entries of proceedings before the United States Board of Tax Appeals in the case above entitled.
2. Findings of fact, opinion, and decision of the Board.
3. Order of redetermination and final decision.
4. Petition for review.

The foregoing to be prepared, certified, and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

W. P. BELL.
W. P. BELL,
Everett, Wash.,
Attorney for B. J. Rucker.
J. B. FOGARTY.
J. B. FOGARTY,
Everett, Wash.,
Attorney for B J. Rucker.

September 28, 1928.

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[27] Filed Oct. 4, 1928. United States Board of Tax Appeals.

In the United States Circuit Court of Appeals for the Ninth Circuit.

—— Term, 1928.

DOCKET No. 3509.

B. J. RUCKER,

Petitioner,

vs.

DAVID H. BLAIR, Commissioner of Internal Revenue,

Respondent.

NOTICE OF FILING AND SERVICE OF PRAECIPE FOR TRANSCRIPT OF RECORD.

To David H. Blair, Commissioner of Internal Revenue:

You are hereby notified that the petitioner above named has filed with the United States Board of Tax Appeals his praecipe for the record of certain parts of the proceedings in the above-entitled action, to be used in the review of the decision of the United States Board of Tax Appeals in the United States Circuit Court of Appeals for the Ninth Circuit and a full, true and correct copy of said praecipe is herewith served upon you.

W. P. BELL.

W. P. BELL,
Everett, Washington,
Counsel for Petitioner.

J. B. FOGARTY.

J. B. FOGARTY,
Everett, Washington,
Counsel for Petitioner.

Service of the foregoing notice is herewith admitted and a copy thereof received together with copy of praecipe in the above-named case.

C. M. CHAREST.

M

Dated this 3d day of October, 1928.

Now, October 31, 1928, the foregoing praecipe and notice of filing certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[Endorsed]: No. 5663. United States Circuit Court of Appeals for the Ninth Circuit. B. J. Rucker, Petitioner, vs. David H. Blair, Commissioner of Internal Revenue, Respondent. Transcript of Record. Upon Petition to Review Order of the United States Board of Tax Appeals.

Filed December 20, 1928.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5663

United States Circuit Court of Appeals for the Ninth District

B. J. RUCKER,
Petitioner,

vs.

DAVID H. BLAIR, Commissioner of Internal Revenue,
Respondent.

BRIEF OF PETITIONER

W. P. BELL,
J. B. FOGARTY,
Attorneys for Petitioner.

No. 5663

United States Circuit Court of Appeals for the Ninth District

B. J. RUCKER,
Petitioner,

vs.

DAVID H. BLAIR, Commissioner of Internal Revenue,
Respondent.

BRIEF OF PETITIONER

STATEMENT OF THE CASE

This is a proceeding to review the decision of the United States Board of Tax Appeals.

The facts as found by the Board of Tax Appeals are as follows:

> "B. J. Rucker was married in December, 1904, and he has lived continuously with his wife since that time. At the time of his marriage Rucker owned a one-half interest in the copartnership of Rucker Brothers, the assets of which consisted of lands and town lots and some shares of stock in the Rucker Bank. Rucker Brothers were engaged in the real estate business at the time of Rucker's marriage, but in 1907 or 1908 the firm entered into the logging and sawmill business. The lands and

town lots owned by the partnership at the time of Rucker's marriage were nonproductive properties from which there has been no income from the time of his marriage to the present time. In fact they have paid in taxes several times what the property would sell for today.

"The profits earned by the panrtership of Rucker Brohters have come from enterprises they have engaged in, such as timber and sawmill and logging operations for which the firm borrowed money and started. They (17) have bought most of their timber on the installment plan, making only a small initial payment therefor.

"Rucker has kept no record of the property he had at the time he was married, nor of what he has accumulated subsequently to marriage.

"Rucker Brothers purchased a quantity of timber from the Puget Mill Company in 1917 at a total purchase price of $625,000 for which they paid $5,000 in cash and the balance of $620,000 in promissory notes extending over a period of several years, all of which notes were signed by W. J. and B. J. Rucker for the partnership. A portion of that timber was later sold at a profit of $80,000. The portion of that timber that was not sold was cut and sawed at their own sawmill and was paid therefor as it was cut and removed.

"During the period 1907 to 1916 the firm of Rucker Brothers borrowed several sums of money for use in the partnership.

"All of Rucker's property at the time of his marriage was his equity in the partnership and all of his income has been from the partnership distributions.

"Rucker filed an individual income tax re-

turn for the year 1919 on March 15, 1920, showing therein as his share of the partnership distribution $62,741.12, also salary received from the partnership of $9,000, making a total net income reported of $71,741.12.

"Mrs. B. J. Rucker had no separate property in 1919. Mrs. Rucker filed an individual income tax return for the year 1919 on May 5, 1921, reporting $35,870.56, one-half of the total income reported by Rucker in his original return. On May 5, 1921, Rucker himself filed an amended individual income tax return showing therein one-half of the total net income reported by him in his individual return of $35,870.56."

Transcript of Record, No. 5663, pp. 22-23-24.

On these facts the Board of Tax Appeals held that the Commissioner of Internal Revenue had correctly held that the entire distributive share of the income of B. J. Rucker in the partnership of Rucker Brothers was separate property.

Transcript of Record, No. 5663, p. 29.

The sole question to be determined by the court is whether the facts as found by the Board of Tax Appeals support the decision of that Board.

Petitioner seeking a reversal of that decision has brought the case to this court for review.

SPECIFICATIONS OF ERROR

1. The Board erred in holding that all of said petitioner's distributive share of the income of

Rucker Brothers for 1919 was the separate income of petitioner.

2. The Board erred in failing to hold that all of said petitioner's distributive share of the income of Rucker Brothers for 1919 was the community property of said petitioner and his wife.

3. The Board erred in its conclusions.

Transcript of Record p. 33.

ARGUMENT

As the different specificatitons of error raise the same question thy may all be discussed together.

No question of fact is involved in this proceeding. The petitioner accepts the facts as found by the Board of Tax Appeals. But he urges that the conclusions drawn from these facts by the Board of Tax Appeals are erroneous.

The question involved is the proper construction of the community property statutes of the State of Washington.

The statutes pertinent to the inquiry are as follows:

Section 6890 of Remington's Compiled Statutes: Property and pecuniary rights owned by the husband before marriage, and that acquired by him afterward by gift, bequest, devise or descent, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of his wife, and he

may manage, lease, sell, convey, encumber or devise by will, such property without the wife joining in such management, alienation, or encumbrance, as fully and to the same effect as though he were unmarried.

Section 6891: The property and pecuniary rights of every married woman at the time of her marriage, or afterward acquired by gift, devise, or inheritance, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of her husband, and she may manage, lease, sell, convey, encumber or devise by will such property, to the same extent and in the same manner that her husband can, property belonging to him.

Section 6892: Property, not acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof.

Sections 6890 and 6891 define separate property and Section 6892 provides that all property not acquired or owned as prescribed by the next two pre-

ceding sections acquired after marriage shall be community property.

The profits were made from timber bought on credit during the existence of the marriage community of petitioner and his wife. (Transcript p 23.)

Notes were given to evidence this indebtedness, signed by W. J. and B. J. Rucker for Rucker Bros. (Transcript, p. 28.)

From these facts the appellants contend that all of the income reported by the said B. J. Rucker and wife was bonafide community income and was properly reported one-half as the income of B. J. Rucker and one-half as the income of his wife, Ruby Rucker.

It is the well established rule that the Federal Courts follow the State Courts in the construction of State Statutes.

> "Decisions by the court of last resort of a state construing state laws, on the faith of which a subsequent contract is made, will be adopted and applied by the Supreme Court of the United States in considering the nature of the contract right relied upon.
>
> "State decisions establishing a rule of property will be followed by the Supreme Court of the United States when called upon to interpret the state law, if it is possible to do so.
>
> "The community system of property was not destroyed, so as to make it impossible for com-

munity or common property to exist, by Wash. act 1893, giving the administration and disposition of the community property to the husband."

Warburton v. White, 176 U. S. 484, 44 Law Ed. 555.

Under the laws of the State of Washington as construed by the Supreme Court the following legal conclusions are firmly established.

1. That all property acquired by husband and wife or either of them during marriage is presumed to be community property and the burden of proof is on the person claiming the same to be separate property.

2. The property acquired by husband and wife or either of them during the marriage relation on borrowed capital is community property.

3. That separate property of either husband or wife so mixed or intermingled with the community as to be incapable of accurate segregation becomes community property.

4. That the rents, issues and profits of community property and the earnings of the husband, and of the wife while living with the husband, is community property and of course community income.

The first proposition is sustained by the following authorities:

"It is settled by the courts where community property statutes exist that property acquired

by the wife during her coverture in her own name is prima facie common property."

Lemon vs. Watterman, 2 W. T. 485.
Yesler vs. Hockstettler, 4 Wash. 349.

"Real property acquired after marriage by deed expressing a money consideration is presumed community property until the contrary is shown by clear and convincing proof."

Yesler vs. Hockstettler, 4 Wash. 349.
Freeburger vs. Caldwell, 5 Wash. 769.
Curry vs. Catlin, 9 Wash. 495.
Woodland Lumber Co. vs. Link, 16 Wash. 72.
Armstrong vs. Oakley, 23 Wash. 122.
Dormitzer vs. Ger. Sav. & Loan S., 23 Wash., 132.

"Where a deed was on its face a conveyance of land for a valuable consideration, prima facie the land conveyed was community property and the burden of proving otherwise is upon the opposing grantee."

Hill vs. Young, 7 Wash., 33.

"A conveyance taken during coverture is prima facie presumed to be community property."

Sackman vs. Thomas, 24 Wash., 660.
Mattson vs. Mattson, 29 Wash., 417.

"The presumption that property acquired by a purchase by the wife during marriage is community property can only be overcome by clear and satisfactory evidence."

Denny vs. Schwabacher, 54 Wash., 689.

"The presumption that all property acquired after marriage is community property applies

whether the legal title is in the name of the wife or the husband."

Patterson vs. Bowes, 78 Wash., 476.

"Property acquired after marriage by eihter husband or wife or both is presumed to be community property, the burden resting upon persons asserting a separate character to establish that fact by clear, certain, and convincing evidence."

In re Slocum estate, 83 Wash., 158.

"Where a husband acquired real property in this State during the marriage relation it is presumed to be community property and the burden rests upon the spouse asserting its separate character to establish the fact by clear and satisfactory evidence."

Plath vs. Mullins, 87 Wash., 403.

"An automobile purchased by a husband from his 'mining operatitons' one year following a division of community property with his wife is presumptively community property, the burden being upon him to establish that it was purchased with property previously set aside to him."

Marston vs. Rue., 92 Wash. 129.

"Real estate purchased on credit of the community *although afterwards paid for with the husband's separate property* is community property." (*Italics are ours*).

Katterhagen vs Meister, 75 Wash. 112.

The following authorities sustain the second proposition:

"Lands purchased by a wife with the proceeds of a loan secured by a mortgage on her

separate property becomes the common property of husband wife."

Yesler vs. Hochstettler, 4 Wash. 349.

"The principal question argued at the rehearing was whether property purchased by a married woman having no separate estate, with borrowed money, becomes her separate property or property of the community. The question was squarely decided in *Yesler vs. Hochstettler*, 4 Wash. 349 (30 Pac. 398). The decision of that case was overlooked in the discussion of this question in the former opinion. In that case the question is exhaustively discussed and the authorities fully reviewed. In the course of the opinion the court say:

'There can be no doubt that if a married woman, under the act of 1881, borrows money entirely upon her personal credit, the money and whatever she busy with it becomes common property,—'

"Without again attempting to review the authorities, we are disposed to think that the statute itself necessitates that conclusion."

Main vs. Scholl, 20 Wash. 205.

"The loan of money to a wife to purchase a hotel business while living with her husband though he was away much of the time and she ran the hotel constitutes a community debt."

Fielding vs. Ketler, 86 Wash. 194

After citing the sections defining separate and community property the court say:

"Under these sections, we have held that the proceeds of a loan to husband and wife, and property purchased therewith, though the money was borrowed on the *security of the sep-*

arate property of one spouse, would constitute community property. Yesler vs. Hochstettler, 4 Wash. 349, 30 Pac. 398; Main vs. Scholl, 20 Wash, 201, 54 Pac. 1125; Heintz vs. Brown, 46 Wash. 387, 90 Pac. 211, 123 Am. St. 937." (*Italics are ours*).

Graves vs. Columbia Underwriters, 93 Wash. 198.

As to the third proposition the finding of fact is as follows:

"Rucker has kept no record of the property he had at the time he was married nor of what he has accumulated subsequently to marriage." (*Transcript* p. 23).

"In regard to the money in the bank, it is impossible to segregate that as to its sources. Its separate and community natures have become so confused that the court cannot apportion them, and the favor with which community property is regarded and the presumptions in favor of it are such that we must agree with trial court that these funds in bank are the property of the community and not subject to the appellant's judgment."

119 Wash. 287, *Jacobs vs. Hoitt.*

"So we have held that, where separate funds have been so commingled with the community funds as to make it impossible to trace the former or tell which are separate and which are community funds, all funds or property into which they have been invested belong to the community. Yesler vs. Hochstettler, 4 Wash. 349, 30 Pac. 398; Doyle vs. Langdon, 80 Wash. 175, 141 Pac. 352; In re Buchanan's Estate, 89 Wash. 172, 154 Pac. 129. Such is the situation here and we hold that the money

and the property into which it was vested belonged to the community."

In re estate of Carmack, 133 Wash. 374.

"When either spouse claims that his separate property has been commingled with community funds he must support by affirmative proof his claim to distinct articles or parcels or to a share of some mass or parcel, or he must fail."

McKay on Community Property, Sec. 323 (Sec. Ed.)

As to the fourth proposition:

"Property acquired by either spouse during the coverture, otherwise than by gift, bequest, devise or descent, is presumptively community property."

Union Sav. & Trust Co., vs. Manney, 101 Wash. 279.

"It is conceded that the property in dispute was acquired and improved by community funds *earned* after marriage. The statute statute makes such property community property."

In re Parker's estate, 115 Wash. 60.

The interest of petitioner in this timber, under an unbroken line of decisions, was the community property of himself and wife and any profit realized therefrom was community income of petitioner and wife.

The decision of the Board of Tax Appeals on this branch of the case is based solely on the decision of the Supreme Court of the State of Washington,

In re: *Brown estate*, 124 Wash. 273. The Brown case was decided on the authority of *Jacobs vs. Hoitt* 119 Wash. 283 and *Finn vs. Finn*, 106 Wash. 137. In both of these cases the facts were entirely different from the facts of the case at bar In *Finn* vs. Finn the property was purchased and partly paid for by the wife with separate funds and the balance secured by a joint note and mortgage upon her separate property. These facts were held to overthrow the presumption of community property even though the property was acquired during the marriage relatiton.

In *Jacobs vs. Hoitt* the holding of the court was that the status of the bakery plant and business acquired before marriage by the use of separate funds and the pledging of separate credit is separate property. In that case Mr. Jacobs signed the note in question before his marriage.

In the case at bar, Mr. Rucker signed the note some 10 to 15 years after his marriage, and a note signed by the husband during the existence of the marriage relatiton is presumptively an obligation of the community.

> "Where a promissory note is executed by the husband as principal, it raises a presumption in favor of the community character of the debt."
>
> *Reed vs. Loney*, 22 Wash. 433.

"Notes given by a corporation and married men, who were stockholders, for the purchase of an automobile to be used as a prize for the benefit of the corporate business are presumptively for the benefit of the communities, and create a community debt, unless the presumption is rebutted by showing that the stock was the separate property of the husbands; the test being whether the transaction was carried on for the benefit of the community, not whether it resulted in a profit."

Way vs. Lyric Theatre Co., 79 Wash. 275.

"Where a note signed by one of the trustees of a corporation was given to defray expenses in securing a contract for the corporation, which, if secured would promote a sale of the community property of the trustee, the note was the community debt of the trustee and his wife."

Peter vs. Hansen, 86 Wash. 413.

"In the absence of any evidence to overcome the same, the presumption is that a note, signed by the husband alone, constituted a community debt."

Denis vs. Metzenbau, 124 Wash. 86.

"Every debt created by the husband during the existence of marriage is prima facie community debt and a sale of land on execution of a judgment rendered for such debt will divest the title of the community in the land."

Calhoun vs. Leary, 6 Wash. 17.

"Any liability incurred by the husband in the prosecution of any business is prima facie a charge against the community; and the presumption to that effect will continue in force

until it is overthrown by proof that such liability was not incurred in any business of which the community would have had the benefit if profit had been realized therefrom."

"The rommunity character of a debt is not changed by the fact that it is evidenced by the negotiable note of the *husband alone* and a judgment rendered upon such note is prima facie enforceable against the property of the community."

McDonough vs. Craigue, 10 Wash. 239.

"The debt upon which a judgment is rendered is prima facie that of the community when the community has been in existence some years prior to the rendition of judgment.

"The complaint in an action by a wife to set aside a Sheriff's deed of the community property does not state a cause of action when it contains no allegation showing that the indebtedness upon which judgment had been rendered was that of the husband alone and enforceable only against his separate estate."

Byrant vs. S. & P. Mill Co. 13 Wash. 692.

"The property of the community is liable for an obligation of suretyship incurred by the husband in behalf of a corporatiton in which he is an officer and stockholder, in order to protect the property and business of the corporation, when, under all the circumstances of his relations with the corporation, it is to be presumed that he was acting for the community, and that any benefits which might have grown out of his connection with such corporatiton would have belonged to the community"

Horton vs. D. K. Banking Co. 15 Wash. 399.

SUMMARY

Under the Statutes of the State of Washington, as construed by the Supreme Court of that State, the profits realized on this timber was community property.

The Federal Courts will follow the construction placed upon said Statutes by the highest court of the State. The authorities relied upon by the Board of Tax Appeals in rendering a decision adverse to petitioner do not support the conclusion placed upon them by the Board of Tax Appeals.

The decisions relied upon by the Board of Tax Appeals were made upon an entirely different set of facts than exist in the case at bar.

The decision of the Board of Tax Appeals is manifestly erroneous and therefore should be reversed.

Respectfully submitted,

W. P. BELL,

J. B. FOGARTY,

Attorneys for Petitioner.

No. 5664

United States

Circuit Court of Appeals

For the Ninth Circuit.

T. TOMICH, HARRY F. SCOTT and H. MULBERGER,

Appellants,

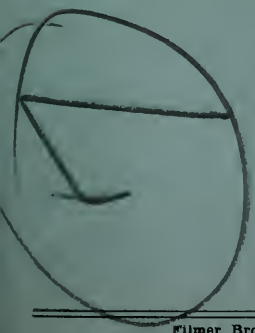
vs.

UNION TRUST COMPANY, a Corporation, and SPOKANE & EASTERN TRUST COMPANY, a Corporation,

Appellees.

Transcript of Record.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA.



Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF SOLICITORS OF RECORD.

JOHN A. SHELTON, Esq., Butte, Montana,
W. N. WAUGH, Esq., Butte, Montana,
Solicitors for Plaintiffs and Appellants.

Messrs. GUNN, RASCH & HALL, Helena, Montana,
Solicitors for Union Trust Company, a Corporation, and Spokane & Eastern Trust Company, a Corporation, Defendants and Appellees.

In the District Court of the United States in and for the District of Montana.

No. 510—IN EQUITY.

T. TOMICH, HARRY F. SCOTT, and H. MULBERGER,
Complainants,

vs.

UNION TRUST COMPANY, a Corporation, SPOKANE & EASTERN TRUST CO., a Corporation, FEDERAL LAND BANK OF SPOKANE, a Corporation, BIG HORN TULLOCK IRRIGATION DISTRICT, a Corporation, ASH SHEEP COMPANY, a Corporation, E. J. McCORMICK, County Treasurer of Treasure County, Montana,

CHARLES P. D. DONNES, H. L. HOYLMAN, JEFFREY DINSDALE, H. M. SRITE, FLOYD UNGLES, C. M. VREELAND, JOHN LIGHTBODY, ROBERT E. CLEARY, and E. P. MARSHALL,

Defendants.

BE IT REMEMBERED that on the 13th day of September, 1917, a bill of complaint was filed herein as follows, to wit: [1*]

In the District Court of the United States in and for the District of Montana.

No. 510.

T. TOMICH, HARRY F. SCOTT, and H. MULBERGER,

Complainants,

vs.

UNION TRUST COMPANY, a Corporation, SPOKANE & EASTERN TRUST CO., a Corporation, FEDERAL LAND BANK OF SPOKANE, a Corporation, BIG HORN TULLOCK IRRIGATION DISTRICT, a Corporation, ASH SHEEP COMPANY, a Corporation, E. J. McCORMICK, County Treasurer of Treasure County, Montana, CHARLES P. D. DONNES, H. L. HOYLMAN, JEFFREY DINSDALE, H. M. SRITE. NICK TOPSICK, PETER BO-

*Page-number appearing at the foot of page of original certified Transcript of Record.

GUNONVICH, FLOYD UNGLES, C. M. VREELAND, JOHN LIGHTBODY, ROBERT E. CLEARY, and N. P. MARSHALL,
Defendants.

BILL OF COMPLAINT.

To the Honorable, the Judge of the District Court of the United States in and for the District of Montana.

T. Tomich, a citizen and resident of the State of Montana, and Harry F. Scott, a citizen and resident of the State of Wyoming, and H. Mulberger, a citizen and resident of the State of Wisconsin, suing on their own behalf and on behalf of all others similarly situated who wish to join in this suit and contribute to the expense thereof and file this, their bill against the defendants, Union Trust Co., and Spokane & Eastern Trust Co. (respectively corporations organized under the laws of the State of Washington), Federal Land Bank of Spokane, a corporation organized under the laws of the United States with its principal place of business in Spokane, Washington, Big Horn Tullock Irrigation District, a Montana corporation, Ash Sheep Company, a Montana corporation, E. J. McCormick, as County Treasurer of Treasure County, Montana, Charles P. Donnes, H. L. Hoylman, Jeffrey Dinsdale, H. M. Srite, Nick Topsick, Peter Bogunonvich, Floyd Ungles, C. M. Vreeland, John Lightbody, citizens and residents of the State of Montana, Robert E. Cleary, and H. P. Marshall,

citizens and residents [2] of the State of Washington, and thereupon your orator complains and says:

First: That the matter in controversy herein exceeds exclusive of interest and costs the sum or value of $3,000.00 and the suit is one involving in its decision a construction of several sections of the Constitution and of the statutes of the United States.

Second: That the following named defendants herein are corporations respectively organized under the laws of the states set after their respective names, to wit:

UNION TRUST COMPANY—Washington.

SPOKANE & EASTERN TRUST COMPANY—Washington.

FEDERAL LAND BANK OF SPOKANE—United States.

ASH SHEEP COMPANY—Montana.

E. J. McCormick is and was at the time of the commencement of this suit, County Treasurer of Treasure County, Montana.

That Bighorn Tullock Irrigation District is a corporation attempted to be created under the laws of the State of Montana, and is acting as such corporation; that Robert E. Cleary and H. P. Marshall are citizens and residents of the State of Washington; that all other defendants herein are citizens and residents of the State of Montana.

Third: That on the 26th day of June, 1919, T. Tomich was the owner in and in possession of and

that he has ever since been the owner of and in the possession of the following particularly described lands, in Treasure County, Montana, to wit:

N.W. ¼ Section 26, Township 5 N., Range 34 E., consisting of 100 acres more or less.

That on the said date Floyd Ungles was the owner of the following particularly described lands, in Treasure County, Montana, to wit:

S. ½ S.W. ¼; S.½ N.W. ¼ S.W. ¼ in Section 13; S. ½ N.E. ¼; N.E. ¼ N.E. ¼; and Lots 2 and 3 in Section 23 and Lots 5 and 6 in Section 14, all in Township 5 N., Range 34E., of the [3] Montana Meridian and consisting of 258.22 acres, more or less; that while the said Floyd Ungles was such owner, and prior to June 26, 1919, he made, executed and delivered to the said Harry F. Scott, a mortgage on the said land and that the same or a renewal thereof has not been paid or discharged, and the same now remains in full force and effect; that on the 26th day of June, 1919, W. H. Ungles was the owner of the following particularly described lands situated in the said Treasure County, to wit:

W. ½ S.E. ¼; W.½ N.E. ¼; N.E.¼ S.W.¼; S.E. ¼; N.W.¼; ¾ N.W.¼ S.W.¼ and Lot 2, all in Section 13, Township 5 N., Range 34 E., and consisting of 141.6 acres, more or less; that prior to the said 26th day of June, 1919, the said H. Mulberger or his pre*de*ssor in interest loaned to said W. H. Ungles a sum of lawful money of the United States of America and to secure the payment of said loan, said W. H. Ungles made, executed and de-

livered to the said H. Mulberger or his predecessor in interest a mortgage on said land to secure the same; that the said loan was never paid and that afterward to avoid foreclosure of the said mortgage, and to satisfy the same said W. H. Ungles made, executed and delivered to the said H. Mulberger or his predecessor in interest, a deed in due form conveying to him the said above-described land and that from and since the first day of January, 1922, the said H. Mulberger or his predecessor, has been the owner of the said particularly described land, and that he is now, such owner.

Fourth: That on or about the 26th day of June, 1919, there was filed in the office of the Clerk of the Montana Fifteenth Judicial District Court, in and for the County of Treasure, a certain paper writing described as a petition, a copy of which is hereunto annexed, marked Exhibit "A" and of this bill made a part; that the said petition prayed for the creation of an irrigation district, the same to embrace certain particularly described lands, amounting to 1,599.22 acres, and including the said lands of the complainants, and said district to be known as Bighorn Tullock Irrigation District; that thereafter such proceedings were had in the said matter that a so-called judgment or decree was made and entered on the 4th day of August, 1919, which so-called judgment or decree is by copy thereof hereunto annexed, marked Exhibit "B" and of this bill made a part.

Fifth: That commissioners of the said so-called irrigation district were [4] named, who there-

after, and acting in pursuance of such appointment, undertook to perform the functions of such commissioners and caused certain proceedings to be had whereby in the year 1919 bonds were issued covering the said district, amounting to the sum of $75,000.00, and, that thereafter annually, excepting in the year, 1922, the said commissioners contracted indebtedness and caused to be issued warrants of the said district for the payment of the same, which said warrants aggregate the sum of $24,458.03; that the sum realized therefrom and from the issuance of the said bonds was expended in a fruitless attempt to construct and maintain a dam across the Bighorn River, and in an attempt to construct and maintain a canal approximately two miles in length, connected therewith and in further repeated unsuccessful efforts to construct and maintain irrigation works; the said bonds issued by the said district are to the extent of approximately $1,000 owned and held by the defendants, Union Trust Company, Spokane & Eastern Trust Co., and to the extent of $61,000 by Robert E. Cleary and H. P. Marshall and various other parties unknown to the complainants herein, but whose names and addresses are known to the defendants, herein, Union Trust Co., and Spokane & Eastern Trust Company; that the warrants issued by the said so-called commissioners to cover indebtedness of the said District in addition to that covered by said bonds are as to a part of those issued for the years 1920, 1924 and 1925 owned and held by the defendants, Union Trust Company and Spokane & Eastern Trust Co.,

and said warrants are otherwise owned and held as the complainants are informed and believed and allege upon their information and belief by the following named defendants, to wit: C. M. Vreeland, John Lightbody, and sundry other persons to the complainants unknown; that the defendants herein, Charles P. Donnes, H. L. Hoylman, Jeffrey Dinsdale, H. M. Srite, Nick Topsick, Peter Bogunonvich, Floyd Ungles and Federal Land Bank of Spokane are with the complainants the owners of the land within said district.

Sixth: That on the 26th day of June, 1919, the land owned by or mortgaged to the complainants herein together with the water rights owned and used in connection therewith and the improvements thereon were of a value of not less than $75.00 per acre; that the said land was then under irrigation, under cultivation, was fenced and had buildings thereon; that the same was adapted to the growing of [5] sugar-beets and is in a locality where sugar-beets are grown and where there is a market for the same and in addition to the water already appropriated for the irrigation thereof there is abundant additional unappropriated water which might be appropriated for that purpose; that the amount of the taxes hereinafter mentioned as having been levied for the purpose of the said proposed improvements if regularly levied and a valid lien upon the said land, the same with the interest accrued thereon amounts to a lien thereon of more than $75.00 an acre and more than $120,000 for the entire district; that the said district has furnished

no water whatever for the irrigation of the said land and the same has been without irrigation since the year 1919; that the irrigation ditches and canals then in use have since become washed out or filled up by the acts of the said so-called irrigation district; the said lands have grown up in weeds, the buildings and other improvements thereon have fallen into decay, said lands have become for a large part unoccupied and have been rendered practically valueless by the acts of the said so-called irrigation district; that the improvements proposed by the said district, if made, could not possibly have increased the value of the said land in an amount exceeding $25.00 per acre and that said assessments to pay for said proposed improvements greatly exceeded any possible increase in value of the said lands which could have taken place as a result of such improvements if they had been made.

Seventh: That annually and from year to year, excepting the year 1922, the said so-called irrigation commissioners have, beginning with the year 1920, undertaken in the manner prescribed by the said act to levy taxes upon the land within the said district for the purpose of payment and discharge of the said bonds and warrants the assessments so levied not being kept separate, and that since the year 1920, excepting the year 1922 the amount of the taxes attempted to be levied and assessed upon the said lands for the purpose of discharging said warrants exceeded $4,890.60 for each year; that the assessed valuation of all of the said lands of the said district in any year since the year 1918 has

not exceeded the sum of $21,965.00; that the taxes levied by the said irrigation district upon the lands within the said district, and exclusive of taxes levied for the purpose of paying interest which has accrued upon bonds issued by the said district, and exclusive of any taxes levied for the purpose of payment of any bonds, did annually, excepting the year 1920 and 1922, exceed 25% of the assessed valuation [6] of all of the lands within the said district; that no part of the said taxes levied in the said district was for the purpose of organization or for any other immediate purpose of the said act, and none of the said taxes were levied for the purpose of making or purchasing surveys, plans or specifications or for stream gauging or gathering data or to make repairs occasioned by any calamity or any other unforeseen contingency; that the taxes levied by the said district have regularly exceeded the limitation prescribed by the act, under which the said so-called district was attempted to be organized, and that the said so-called commissioners have annually filed with the Clerk of the County Commissioners of the said county a certified copy of the several resolutions, which the said so-called irrigation district had attempted to adopt for the purpose of the levying of the said taxes; that the said so-called commissioners have annually beginning with the year 1920, excepting the year 1922, furnished to the county treasurer of the said county a list of the said district lands in the said county together with the amount of taxes or assessments against the said lands for irrigation district

purposes, and that the said county treasurer has annually in the manner prescribed by the said act collected or attempted to collect said taxes; that the said county treasurer has refused to segregate the taxes levied in pursuance of the acts of the said so-called irrigation district from the taxes regularly levied for state and county purposes and at all times excepting the year 1922 has refused to receive payment of taxes regularly levied for state and county purposes (though payment of the same was annually and in due time duly tendered to the said county treasurer) without payment being also made of said taxes attempt to be levied in pursuance of the acts of the said so-called irrigation district; that with the exception of the taxes for the year 1920 the taxes attempted to be levied by the said so-called irrigation district or in pursuance of or in furtherance of its acts have not been paid and heretofore and during the year 1922 the county treasurer of the said county advertised the said lands for sale for delinquent taxes of the said so-called irrigation district and thereafter, the same was attempted to be sold by the said county treasurer and the same was bid in at such tax sale by the said County of Treasure and record of all of the said proceedings appear upon the books officially kept by the said county treasurer in the county seat of the said county. Said county treasurer threatens to and will, unless enjoined, execute a tax deed to the purchaser for each of the [7] tracts owned by complainants, and they and each of them will be recorded in the office of the county

clerk and recorder of the said county; proceedings so had and taken with reference to the attempted tax sale of the said property casts a cloud upon the title to the said lands and the whole thereof and the said further proceedings including the issuance of the said tax deeds and the recording thereof will cast a further cloud upon the said title.

Eighth: That the proceedings for the organization of the said district were not sufficient to give jurisdiction to the court for that purpose; that the said petition wholly failed to describe generally or at all the character of the works, water rights, canals and other property proposed to be acquired or constructed for irrigation purposes, in the proposed district; that the said petition falsely stated inferentially that such works proposed to be constructed was the extension of a canal which might be constructed at an expense not exceeding $3,000.00, while as a matter of fact the irrigation works actually proposed to be constructed was besides the said canal a dam across the Bighorn River, costing not less than $72,000.00; that no notice sufficient to give the Court jurisdiction was given of the said proceedings, the only notice given being a publication of the said insufficient petition and notice that the said petition would be heard at a certain time and place.

Ninth: That on the 26th day of June, 1919, there was in existence a system of irrigation by which water was supplied to all of the lands owned by or mortgaged to the complainants; that the said lands and all of the said lands alleged to be owned by or

mortgaged to the said complainants were then under irrigation, and there were water rights appurtenant thereto; that the said complainants did not and no one of them did consent to the inclusion of their said lands or the land mortgaged to them within the said district; they never at any time participated in the organization of the said district, and at all times opposed the same and opposed the inclusion of their said lands within the said district.

Tenth: That said Chapter 146 of the Montana Eleventh Session Laws is violative of the due process of law clause of the 14th Amendment to the Constitution of the United States in that it permits that assessments may be levied for special improvements in irrigation districts in excess of any benefits which may [8] or might possibly accrue as a result of such special improvements and the said chapter does not limit the assessments which may be levied by any irrigation district to the value of the benefits which may accrue as a result thereof; that certain validation proceedings were attempted to be had whereby said proceedings for the issuance of the said bonds were sought in pursuance of Section 41 of Chapter 146 of the Montana Session Laws to be confirmed and validated, which said proceedings are by copy thereof hereunto annexed marked Exhibit "C," and hereby made a part of this bill; that the said proceedings were void and without any force or effect and that the said acts of the said commissioner and all of their herein mentioned acts were void and without any force or

effect, for the reason that the Court in the said proceedings was acting without jurisdiction, the land of said complainants, or the land mortgaged to them were not properly included within the said district and the said so-called irrigation district and the said Court had no jurisdiction, power or authority to include such lands in the said irrigation district, and said Court had not power or authority to proceed in the said validation proceedings for the further reason that the said Section 41 is violative of the due process of law clause of the 14th Article of Amendment and of Section 2, Article 3, and paragraph second of Article 6 of the Constitution of the United States, and is in conflict with Sections 24 and 28 of the Judicial Code of the United States, in that the said proceedings provided for by the said Section 41 may, and in this instance did, involve a determination of whether certain proceedings constituted due process of law and whether by reason thereof they were violative of the Federal Constitution and involved a question arising under the Constitution of the United States; that the amount involved in the said proceeding as it affected each of the complainants herein exceeded the sum or value of $3,000.00, exclusive of interest and costs, and was within the jurisdiction conferred by the Federal Constitution and laws on the United States District Court, and that such proceedings could not be bought in the District Court of the United States or removed thereto under the terms of the said section as construed by the highest court of the State of Montana, and that said

Section 41 [9] as so construed infringed the judicial power of the United States and deprived the District Court of the United States of jurisdiction given it by the Constitution and laws of the United States.

Eleventh: Complainants allege upon their information and belief that all of the facts hereinbefore alleged with reference to the insufficiency of the petition and of the notice of the formation of the said district; that the lands of the complainants were under irrigation prior thereto, and they did not consent to the inclusion of their lands in the said district; that the said bonds as issued and said assessments made each exceeded the benefits which could possibly accrue to said lands as a result of the said proposed improvements and were confiscatory of the lands of the complainants; that the said taxes levied exceeded the maximum allowed by law, and all other facts herein alleged with reference to the illegality of the issuance of the said bonds and warrants and of the levy of the said taxes were known to all of the defendants herein alleged to be owners or holders of the said bonds or warrants and the said defendants and each of them at the said times had notice of all of such facts.

Twelfth: That all of the proceedings had and all of the papers filed in the said Fifteenth Judicial District Court in the matter with the exception of an undertaking filed with the said petition on June 26, 1919, a map filed in said court on August 4, 1919, bonds of various so-called irrigation district commissioners, petitions for and orders appointing

them and a petition filed December 9, 1919, but not acted upon and excepting papers which are by copies hereunto annexed as Exhibits "A" to "C," inclusive, are by copy thereof annexed, marked Exhibit "D," and of this bill made a part, and that no other proceedings of any kind or character were had or taken in the said Fifteenth Judicial District Court in said matter and no paper filed therein, except those mentioned and those hereunto annexed as exhibits.

In consideration whereof and inasmuch as the complainants have no remedy at law and are only relievable in equity, and to the end that the complainants may have the relief which they can only obtain in a court of equity, and to the end that the said defendants, and each of them, may answer herein, but not upon oath or affirmation, the benefit whereof is expressly waived by the complainants, [10] who now pray the Court that a decree be entered herein:

First: That the cloud caused by the recording of the said irrigation tax proceedings in the office of the county treasurer be removed, and the same decreed to be no cloud upon the title of the complainants in and to the said lands.

Second: That the defendant, E. J. McCormick, as county treasurer, be enjoined and restrained from issuing any tax deeds in pursuance of any tax sale made of the said lands, or any part thereof, for any of the said delinquent irrigation district taxes.

Third: That said Chapter 146 be declared to be violative of the due process of law clause of 14th

Amendment of the Federal Constitution and that Section 41 of Chapter 146 of the Session Laws of the Montana Eleventh Legislative Assembly be declared to be violative of the Constitution of the United States and in conflict with Sections 24 and 28 of the Judicial Code of the United States and void and without any force or effect.

Fourth: That the so-called judgment and decree of the Montana 15th Judicial District Court in and for the county of Treasure dated the 17th day of November, 1919, in the matter of the said Irrigation District proceedings, be declared to be in excess of the jurisdiction of the said court and without force or effect.

Fifth: That complainants have such other and further relief in the premises as equity and good conscience may require and for costs of suit.

Complainants pray for general relief.

May it please your Honor to grant unto *this* complainants a writ of subpoena to be directed to the said Union Trust Company, a corporation; Spokane & Eastern Trust Company, a corporation; Federal Land Bank of Spokane, a corporation; Big Horn Tullock Irrigation District, a corporation; Ash Sheep Company, a corporation; E. J. McCormick, as county treasurer of Treasure County, Montana; Charles P. Donnes, H. L. Hoylman, Jeffrey Dinsdale, H. M. Srite, Nick Topsick, Peter Bogunonvich, Floyd Ungles, C. M. Vreeland, John Lightbody, Robert E. Cleary and H. P. Marshall, and each of them, thereby commanding them, and each of them, at a certain time, and under a certain

penalty, therein to be limited, personally to appear before this Honorable Court and then and there full, true and perfect answer make.

W. N. WAUGH,
JOHN A. SHELTON,
Solicitors for Complainants. [11]

EXHIBIT "A."

In the District Court of the Fifteenth Judicial District of the State of Montana, in and for the County of Treasure.

In the Matter of the Establishment and Organization of the BIG HORN-TULLOCK IRRIGATION DISTRICT OF TREASURE COUNTY, MONTANA.

PETITION.

To the Honorable District Court in and for the County of Treasure, State of Montana.

The undersigned holders of title or evidence of title to lands situate in the County of Treasure, State of Montana, hereinafter described, susceptible of irrigation from the same general source and by the same system of canals and works and included in the hereinafter proposed Irrigation District, hereby propose and petition for the establishment and organization of an Irrigation District pursuant to the provisions of Chapter 146 of the Acts of the Eleventh Legislative Assembly of the State of Montana, and Acts amendatory thereof

and supplementary thereto and your petitioners hereby respectfully show to the Court:

I.

That your petitioners represent and constitute a majority in number of the holders of title or evidence of title to lands hereinafter set forth and included in said proposed Irrigation District. That they also represent a majority of the acreage of said lands within the proposed Irrigation District, and that all of said lands are susceptible to irrigation from the same source and by the same general system of works.

II.

That the name suggested for the proposed Irrigation District is Big Horn Tullock Irrigation District.

III.

That the following is a general description of the lands to be included within the said proposed Irrigation District, aggregating approximately 1650 acres, as follows: The Northwest quarter of Section Two in Township Four North of Range Thirty-four East; Sections Thirteen, Twenty-three, Twenty-seven and Thirty-four, and the Southeast quarter of Section Fourteen, Northwest quarter of Section Twenty-four, [12] South half section Twenty-two, Northwest quarter of Section Twenty-six, in Township Five North of Range Thirty-four East: All being in Treasure County, Montana.

That the following are the names of the holders of title or evidence of title to the lands within the proposed irrigation district, ascertained in the man-

ner as provided by law, together with a description of the land and the approximate acreage of land owned or held by each of said owners or holders of title or evidence of title and the respective post-office addresses of each thereof as far as known to your petitioners, said description of land and the approximate acreage after each name set forth being and meaning to include only those subdivisions or portions of subdivisions as can be irrigated from the same general source and by the same general system of works, which are hereinafter described.

THE FOLLOWING LANDS ALL BEING IN RANGE THIRTY-FOUR EAST.

Name and Address.	Description	Sec.	Twp.	Acres.
Charles P. Donnes,				
Bighorn, Montana	Lots 4 and 5	2	4	80
Ash Sheep Co.,				
Bighorn, Montana	Lots 1, 8, 9, 12	2	4	
	SE. ¼ SE. ¼	22	5	
	S. ½ SW. ¼	23	5	
	NE. ¼ NE.¼	27	5	
	SE. ¼ NW. ¼, NW. ¼ NE. ¼, Lts. 1, 3,	27	5	
	N.½ SE.¼, S.½ NE.¼	27	5	455
H. L. Hoylman,				
Bighorn, Montana	Lot 5	34	5	
	Lots 2 and 3	*12*	4	50

ame and Address.	Description	Sec.	Twp.	Acres.
. C. Owens,	Lots 1, 3, 4,	34	5	
Bighorn, Montana	SW. ¼ SW. ¼	27	5	
	E. ½ NE. ¼	34	5	
	SE. ¼ SE. ¼	27	5	130
. E. Ungles,				
Bighorn, Montana	NW. ¼ NE. ¼, NE. ¼ NW. ¼	34	5	
	NE. ¼ SW. ¼	23	5	85
effrey Dinsdale,				
Bighorn, Montana	NW. ¼ SW. ¼, N. ½ NE. ¼ SW. ¼	27	5	
	SE. ¼ SW. ¼, SW. ¼ SE. ¼	27	5	
	Lots 6	28	5	165
3]				
ellie Smith,				
Bighorn, Montana	S. ½ NE. ¼ SW. ¼	27	5	20
. M. Srite,				
Bighorn, Montana	Lot 11	28	5	20
ick Topsick,				
Bighorn, Montana	Lot 2	27	5	14
. Y. Cook,				
Bighorn, Montana	Lots 6 and 7	22	5	50
eter Bogunovich,				
Bighorn, Montana	Part of N. ½ SW. ¼	26	5	3
Tomich,				
Butte, Montana	NW. ¼	26	5	100
nas. Badlands,				
Bighorn, Montana	Lot 5	22	5	
	Lot 5	23	5	30

Name and Address.	Description.	Sec.	Twp.	Acres.
John Topsick,				
Bighorn, Montana	Part of SE. ¼	23	5	5
Floyd Ungles,				
Bighorn, Montana	S. ¼ SW. ¼, S. ½ NW. ¼ SW. ¼	13	5	
	S. ½ NW. ¼, NE. ¼ Ne. ¼ Pt 2, 3	23	5	240
	Lots 5 and 6	14	5	
J. W. McCoy,				
Bighorn, Montana	Part of NW. ¼	24	5	40
W. H. Ungles,				
Bighorn, Montana	W. ½ SE. ¼, W. ½ NE. ¼, NE. ¼ SW. ¼, SE. ¼ NW. ¼, ¾ of NW. ¼ SW. ¼ Lot 2	13	5	165

IV.

That the source from which the lands within the proposed Irrigation District are to be irrigated is from waters to be taken from the Big Horn River and diverted from the east bank of said river, in Section Twenty-two, Township Four North of Range Thirty-four East, and to be conveyed through an irrigation ditch or canal commencing at said point of diversion and extending in a northeasterly direction through sections Fifteen, Ten, Three and Two, Township Four North, Range Thirty-four East, and through Sections Thirty-four, Twenty-seven, Twenty-six, Twenty-three, Twenty-four and Thirteen, in Township Five North of Range Thirty-four East.

V.

That your petitioners present and file herewith a map or plat of the proposed irrigation district on which is shown the line of said proposed canal and [14] lands embraced within said proposed irrigation district, hereto attached and marked Exhibit "A."

VI.

That your petitioners also file herewith an undertaking to be approved by this Honorable Court or the Judge thereof, conditioned that your petitioners shall well and truly pay or cause to be paid all of the costs in and to proceedings thereunder preliminary to the organization of said proposed irrigation district hereby petitioned for in the event that the said organization shall not be effected.

WHEREFORE your petitioners pray that the lands *embrace* within the proposed irrigation district hereinabove described, be created and organized into an irrigation district to be known as the Big Horn-Tullock Irrigation District in accordance with, and pursuant to the provisions of Chapter 146 of the Acts of the Eleventh Legislative Assembly of the State of Montana, and Acts supplemental thereto and amendatory thereof, and for such other and further relief as to the Court may seem proper. [15]

Petitioners.	Postoffice Address.
F. C. OWENS	Big Horn, Montana.
YEGEN BROS.	Billings, Montana.
By C. Yegen	
ASH SHEEP CO.,	
By L. S. Perkins	Bighorn, Montana.
W. E. UNGLES	" " "
NICK TOPSICK	" " "
FLOYD UNGLES	" " "
CHARLES BADLANDS	" " "
H. L. HOYLMAN	" " "
CHAS. P. DONNES	" " "
JEFFREY DINSDALE	" " "
W. H. UNGLES	" " "
J. E. DINSDALE	" " "
PETER BOGUNOVICH	" " "
D. Y. COOK	" " "

[16]

State of Montana,
County of Treasure,—ss.

F. C. Owens, of lawful age, being first duly sworn, deposes and says:

That he is one of the petitioners herein and that he has read the above and foregoing petition and knows the contents thereof, and that the matters and things therein stated are true except as to those matters stated upon information and belief and as to those he believes them to be true. That he makes this verification on his own behalf and on the behalf of the other petitioners herein.

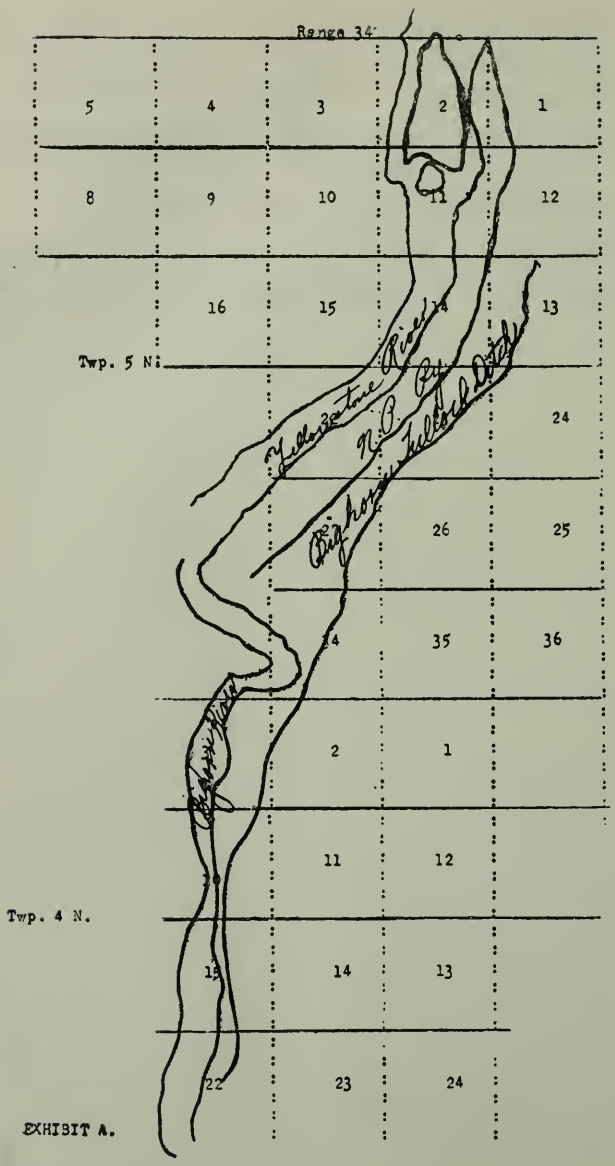
F. C. OWENS.

Subscribed and sworn to before me this 25th day of June, 1919.

[Notarial Seal] HENRY V. BEEMAN,
Notary Public for the State of Montana, Residing at Forsyth, Montana.

My commission expires April 4, 1922.

[Endorsed]: Filed June 26, 1919. J. D. Clark, Clerk. By F. M. Clark, Deputy. [17]


Range 34
5
4
3
2
1
8
9
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11
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16
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14
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Twp. 5 N.
24
26
25
14
35
36
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11
12
Twp. 4 N.
13
14
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22
23
24

EXHIBIT A.

[18]

EXHIBIT "D."

In the District Court of the Fifteenth Judicial District of the State of Montana, in and for the County of Treasure.

In the Matter of the Establishment and Organization of the BIG HORN–TULLOCK IRRIGATION DISTRICT OF TREASURE COUNTY, MONTANA.

ORDER.

Upon reading and filing the petition herein, it is hereby ordered that a hearing on said petition be had and held before the Court on the 4th day of August, 1919, at the hour of ten o'clock A. M. of said day in the courtroom in said Treasure County, Montana, at which time and place all persons interested, whose lands or rights may be damaged or benefitted by the organization of the proposed Irrigation District or irrigation works or improvements therein to be acquired or constructed as set forth in the petition herein filed, may appear and contest the necessity or utility of the proposed irrigation District or any part thereof.

And it is further ordered that the Clerk of this court shall cause to be published at least once a week for two successive calendar weeks in the "Hysham Echo," a weekly newspaper of general circulation published in said county of Treasure, a copy of the petition filed herein together with a notice stating the time and place fixed by this Court

in this order for the hearing of said petition and that the Clerk of this court shall, within three days after the first publication of said notice aforesaid, mail a copy of said petition and notice to each non-resident holder of title or evidence of title to the lands within the proposed Irrigation District as set forth in the petition herein whose postoffice address is stated in said petition.

Done in open court this 26th day of June, 1919.

GEO. P. JONES,
Judge.

[Endorsed]: Filed June 26, 1919. J. D. Clark, Clerk of Court. By F. M. Clark, Deputy. [19]

EXHIBIT "D" (Continued).

In the District Court of the Fifteenth Judicial District of the State of Montana, in and for the County of Treasure.

In the Matter of the Establishment and Organization of the BIG HORN-TULLOCK IRRIGATION DISTRICT OF TREASURE, MONTANA.

ORDER.

In the above-entitled matter it is by the Court hereby ORDERED:

That the following named persons be and are hereby appointed Commissioners in and for the Big Horn-Tullock Irrigation District, to wit: In and for Division No. 1 of said District, L. S. Perkins; in and for Division No. 2 of said District, Jeffrey

Dinsdale; in and for Division No. 3 of said District, Floyd Ungles; and that said Commissioners shall upon qualifying as by law required, hold their respective offices for the term provided by law, and until their successors are elected and qualified, and they shall be charged with the duties and vested with the powers provided by law.

Done in open court this 4th day of August, 1919.

DANIEL L. OHERN,
Judge of the District Court, Presiding.

[Endorsed]: Filed Aug. 4, 1919. J. D. Clark, Clerk. By F. M. Clark, Deputy. [20]

EXHIBIT "B."

In the District Court of the Fifteenth Judicial District of the State of Montana, in and for the County of Treasure.

In the Matter of the Establishment and Organization of the BIG HORN-TULLOCK IRRIGATION DISTRICT OF TREASURE COUNTY, MONTANA.

DECREE.

On this 4th day of August, 1919, the same being a judicial day of the regular July, 1919, Term of the above-entitled court, this matter came on regularly for hearing upon the petition of certain holders of title or evidence of title to lands situate in the County of Treasure, State of Montana, whose names are set forth in said petition which was heretofore filed in this court, praying that the establishment

and organization of an Irrigation District in accordance with the provisions of Chapter 146 of the Acts of the Eleventh Legislative Assembly of the State of Montana, and Acts amendatory thereof and supplemental thereto; and said petitioners appearing by counsel and the Court having heard the testimony and the arguments of counsel, and being fully advised in the premises, it is by the Court found and determined:

1. That the petition herein filed has been duly and properly signed by a majority in number of the holders of title or evidence of title to the lands within the proposed Irrigation District, and that said petitioners represent a majority in acreage of the lands included therein.

2. That said petition sets forth a general description of the lands to be included within said proposed Irrigation District, the names of the holders of title or evidence of title to the lands therein, together with the postoffice addresses of each and every nonresident holder of title or evidence of title to lands within said proposed Irrigation District, the general source from which said lands are to be irrigated, and the character of the works, water rights, canals and other property to be acquired and constructed for Irrigation purposes in said proposed District.

3. That all of the lands set forth and described in said petition and to be included in said Irrigation District are situated in said county of Treasure, State of Montana. [21]

4. That the lands to be included in said Irrigation District are susceptible to irrigation from the same source and by the same general system of works.

5. That said petition sets forth the name suggested for the proposed Irrigation District, and that said petition is accompanied by a map or plat of the proposed Irrigation District, and that there has been filed therewith, a good and sufficient bond and undertaking, duly approved by the Court, as by law required, to pay all the costs in and about the proceedings preliminary to the organization of the District, in the event said organization is not affected.

6. That due and legal notice of the hearing upon said petition as set forth by the order of this Court herein made and entered has been given as by law required, as shown by the affidavit, and certificate of publication and service filed herein, which said notice and service thereof are by Court hereby approved.

7. That each and all of the orders of this Court and the provisions of Sections One, Two, Three and Four of Chapter 146 of the Acts of the Eleventh Legislative Assembly of the State of Montana, and Acts amendatory thereof and supplemental thereto, have been duly complied with.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED BY THIS COURT, that said petition be allowed and that in accordance therewith an Irrigation District be and it is hereby established and designated as the Big Horn-Tul-

lock Irrigation District, in accordance with and pursuant to the provisions of Chapter 146 of the Acts of the Eleventh Legislative Assembly of the State of Montana, and that said District be composed of and include the following described lands situated in the said county of Treasure, State of Montana, to wit: [22]

LANDS SITUATE IN TOWNSHIP FOUR NORTH, RANGE THIRTY-FOUR EAST.

Name and Address.	Description.	Sec.	Acres Irrigable.
Ash Sheep Co.,			
Big Horn, Montana	Part of N. ½ Lot 12	2	3.4
	Part of E. ½ Lot 1	3	7
	Part of E. ½ Lot 8	3	14.7
	Part of N. ½ Lot 9	3	10.2
Charles P. Donnes,			
Big Horn, Montana	Lot 4	2	45
	Lot 5	2	27
H. L. Hoylman,			
Big Horn, Montana	Part of W. ½ Lot 2	2	5
	Lot 3	2	38
P. Mauro,			
Big Horn, Montana	Part of N. ½ Lot 6	2	4

LANDS SITUATE IN TOWNSHIP FIVE NORTH, RANGE THIRTY-FOUR EAST.

Name and Address.	Description	Sec.	Acres Irrigable.
F. C. Owens,			
Big Horn, Montana	Part of SE. ¼ SE. ¼	27	19.9
	Part of W. ½ NE. ¼ NE. ¼	34	4
	Part of W. ½ Lot 5	34	7.6
	Part of W. ½ SE. ¼ NE. ¼	34	6.5
	Part of Lot 4	34	26.3
	SW. ¼ SW. ¼	27	40
	Part of N. ½ Lot 1	34	17.2
	Part of N. E. ¼ Lot 3	34	3
W. E. Ungles,			
Big Horn, Montana	NW. ¼ NE. ¼	34	40
	NE. ¼ NW. ¼	34	33.6
Jeffrey Dinsdale,			
Big Horn, Montana	N. ½ NE. ¼ SW. ¼	27	19.5
	NW. ¼ SW. ¼ Less N. P. Right of Way	27	35
	SW. ¼ SE. ¼	27	40
	SE. ¼ SW. ¼	27	40
	Part of Lot 6	28	25.3
H. M. Srite,			
Big Horn, Montana	Lot 11	28	16
	Lot 1	33	1

Name and Address.	Description	Sec.	Acres Irrigable.
T. Tomich,			
Butte, Montana	Part of NE. ¼ NW. ¼	26	24.2
	NW. ¼ NW. ¼	26	40
	Part of N. ½ SE. ¼ NW. ¼	26	5.7
	Part of SW. ¼ NW. ¼	26	27
Nellie Smith,			
Big Horn, Montana	S. ½ NE. ¼ SW. ¼	27	20
Peter Bogunonvich,			
Big Horn, Montana	Part of NW. ¼ SW. ¼ lying below irrigation canal	26	3.8
[23]			
Ash Sheep Co.,			
Big Horn, Montana	Part of NE. ¼ NE. ¼	27	18.5
	Part of NW. ¼ NE. ¼	27	32.8
	NE. ¼ NW. ¼	27	38.5
	SE. ¼ NE. ¼	27	39.9
	SW. ¼ NE. ¼ less N. P. right of way	27	35.9
	SE. ¼ NW. ¼ less N. P. right of way	27	34.8
	Lot 3	27	37.5
	NE. ¼ SE. ¼	27	39
	NW. ¼ SW. ¼	27	40

Name and Address.	Description	Sec.	Acres Irrigable.
	Part of SE.¼ SW¼ West of Irrigation Ditch	23	20.8
	SW. ¼ SW. ¼ less N. P. Right of way	23	36.4
	SE. ¼ SE. ¼ less N. P. Right of way	22	32
Nick Topsick, Big Horn, Montana	Lot 2	27	13.5
D. Y. Cook, Big Horn, Montana	Lot 7	22	25
	Part of Lot 6	22	5
Charles Badlands, Big Horn, Montana	Part of Lot 5	23	21.3
	Part of Lot 5	22	5.6
W. E. Ungles, Big Horn, Montana	NE. ¼ SW. ¼ less N. P. Right of way	23	29.4
John Topsick, Big Horn, Montana	Part of NW. ¼ SE. ¼ lying Northwest of Irrigation Ditch	23	6.5
Floyd Ungles, Big Horn, Montana	Part of W. ½ SW. ¼ SE. ¼ lying west of Irrigation Canal	13	1.25
	SE. ¼ SW. ¼	13	37
	SW. ¼ SW. ¼ less N. P. Right of Way	13	35.9
	Part of S. ½ S. ½ NW.		

Name and Address.	Description	Sec.	Acres Irrigable.
	Part of Lot 5	14	8
	Lot 6 Less N. P. Right of Way	14	38.32
	NE. ¼ NE. ¼ Less N. P. Right of Way	23	34.8
	Lot 2 Less N. P. Right of Way	23	17.85
	SE. ¼ NE. ¼	23	37.8
	SW. ¼ NE. ¼ Less N. P. Right of Way	23	33.8
	Part of Lot 3	23	5
J. W. McCoy, Big Horn, Montana	Part of NW. ¼ NE. ¼ NW. ¼	24	1.4
	Part of NW. ¼ NW. ¼ West of Irrigation Canal	24	29
	Part of W. ½ SW. ¼ NW. ¼ lying West of Irrigation Canal	24	4.8
[24] W. H. Ungles, Big Horn, Montana	Part of W. ½ NW. ¼ NE. ¼ lying West of Irrigation Canal	13	8.5
	Part of NE. ¼ NW. ¼ Less N. P. Right of Way	13	24
	Part of SW. ¼ NE. ¼ West of Canal	13	5.8

Name and Address.	Description	Sec.	Acres Irrigable.
	SE. ¼ NW. ¼ Less N. P. Right of Way	13	35.1
	Part of South Half Lot 2	13	3.3
	Part of W. ¼ NW. ¼ SE. ¼ W. of Canal	13	3.4
	NE. ¼ SW. ¼ Less N. P. Right of Way	13	38.5
	Part of NW. ¼ SW. ¼ Less N. P. Right of Way	13	23

It is intended, AND IT IS HEREBY ORDERED, that only such portions of the above-described parcels of land as lie and are situated under the proposed Irrigation Canal of the said Big Horn-Tullock Irrigation District and which are susceptible of irrigation from said irrigation system be and are hereby included in said Irrigation District, said Irrigation District consisting of and including within its boundaries, an aggregate of 1599.22 acres of irrigable land.

IT IS FURTHER ORDERED AND DECREED that the said Irrigation District be and the same is hereby divided into three divisions to be known as Division No. 1, Division No. 2 and Division No. 3, said Divisions respectively to be composed of and to include the lands in said District hereinafter described, to wit:

DIVISION No. 1 to consist of all the lands included in said District and situated and lying

within Sections Two and Three in Township Four North of Range Thirty-four East, and within Sections Thirty-three and Thirty-four in Township Five North of Range Thirty-four East.

DIVISION No. 2 to contain all the lands included in said District situate and lying within Sections Twenty-six, Twenty-seven and Twenty-eight of Township Five North of Range Thirty-four East.

DIVISION No. 3 to contain all the lands included in said District situate and lying within Sections Thirteen, Fourteen, Twenty-two, Twenty-three and Twenty-four in Township Five North of Range Thirty-four East.

Done in open court this 4th day of August, 1919. [25]

DANIEL L. OHERN,
Judge of the District Court Presiding.

[Endorsed]: Filed Aug. 4, 1919. J. D. Clark, Clerk. By F. M. Clark, Deputy. [26]

EXHIBIT "C."

In the District Court of the Fifteenth Judicial District of the State of Montana, in and for the County of Treasure.

In the Matter of the Issuance of Seventy-five Thousand Dollars of the Coupon Bonds of the BIG HORN-TULLOCK IRRIGATION DISTRICT OF TREASURE COUNTY, MONTANA.

PETITION.

Come now L. S. Perkins, Floyd Ungles and Jeffrey Dinsdale, as Commissioners of the Big Horn-Tullock Irrigation District of Treasure County, Montana, and respectfully represent to the Court:

I.

That on the fourth day of August, 1919, by an order and decree of the District Court of the Fifteenth Judicial District of the State of Montana, in and for the county of Treasure, all of the lands and territory embraced within and described by said Decree, were created and organized as an Irrigation District of the county of Treasure and State of Montana, pursuant to the terms and provisions of the statutes of the State of Montana, in such case made and provided and particularly Chapter 146 of the Laws of the Eleventh Legislative Assembly of the State of Montana, and Acts amendatory thereof and supplementary thereto.

II.

That your petitioners are the duly elected qualified and acting Commissioners of the said Big Horn-Tullock Irrigation District.

III.

That heretofore such Commissioners have formulated and adopted a general plan for the irrigation and reclamation of said lands embraced within the said Irrigation District, and for the acquiring and furnishing of a water supply for the land owners

within said District, and for the purchase, construction and acquisition of such water right, property, canals, ditches, works and equipment, as may be necessary for such purpose; and that said Board of Commissioners have heretofore caused examinations, plans and estimates to be made as were necessary to demonstrate the practicability of such general plan for the irrigation and reclamation of all of the lands within said Irrigation [27] District for the purpose of furnishing a proper basis for estimating the cost of carrying out such general plan; all of such surveys, maps, plans, reports and estimates being made under the direction and supervision of an Irrigation Engineer of well known competency and standing, all of the same being duly and regularly certified by said Engineer, (1) as by law required; whereupon said Board of Commissioners of said Big Horn-Tullock Irrigation District did now proceed to and (2) did determine the amount of money necessary to be raised for the acquiring by purchase or otherwise, and for the construction of said proposed water rights, canals, ditches, irrigation works and property to be Seventy-five Thousand Dollars, and did within ten days thereafter notify all persons and corporations, holders of title or evidence of title within the said District as by law required, of the filing of said report by said engineer, and the action and determination of said Board of Commissioners as to the amount of money necessary to be raised for such purposes.

IV.

That thereafter and on the twentieth day of October, 1919, certain land owners, holders of title or evidence of title to lands within the said District, constituting more than a majority in number and in acreage, filed with the Secretary of the Board of Commissioners of said District, your petitioners herein, for their consideration and for their action thereupon as provided by law, a petition praying that your petitioners as such Board of Commissioners cause to be issued the negotiable coupon bonds of said District in the sum of Seventy-five Thousand Dollars, same to run for a period not longer than thirty years from their date, said bonds to be issued in manner and form as the said Board of Commissioners deem for the best interest of said District and the land owners therein, said bonds and proceeds thereof to be used for acquiring by purchase or otherwise, all such water rights, canals, ditches, irrigation works, and property, and the construction of additional works and structures as may be necessary for the proper irrigation and reclamation of the lands within said District, all of which more fully appears by the certified copy of said petition herein referred to, which is hereto annexed and made a part thereof, and marked Exhibit "A."

V.

That upon the filing of said petition, your petitioners, as such Board of Commissioners, being in regular sessions assembled, did on the twenty-second day of [28] October, 1919, after carefully

examining and considering said petition determine that said petition was signed by more than a majority in number and acreage of the holder of title or evidence of title to lands *embrace* within said district, and that the same was in all respects in conformity to law and on said twenty-second day of October, 1919, your petitioners, as such Board of Commissioners, did authorize and direct the issuance of the bonds of said Irrigation District in the sum and for the purposes specified in said petition, and did fix the date, number, denomination and maturity of said bonds and did specify the rate of interest thereon, and did designate the place of payment of said bonds and interest coupons attached thereto, and prescribed the form and details of said bonds and interest coupons to be attached thereto, and did provide for a levy of special tax or assessment as provided by law, and did provide for instituting proceedings in the proper court for the confirmation of said bonds; all of which more fully appears by the certified copy of the order and resolutions hereinabove referred, which is hereto attached and made a part hereof, and marked Exhibit "B."

VI.

That this petition is filed and presented by your petitioners for the purpose of obtaining a finding and determination of this Court as to whether the provisions and requirements of law and particularly of the Acts hereinabove referred to have been complied with, and to determine the regularity, legality and validity of said proceedings preliminary and relative to the issuance of said bonds, and the levy

of the special tax or assessment for the payment of the principal and interest of the said bonds, as provided for by said proceedings and the legality and validity of said bonds and special tax, and for the purpose of obtaining an order, judgment and decree of this court, ratifying, approving and confirming said proceedings and ratifying, approving and confirming said bonds and the special tax or assessment levied by said proceedings for the purposes hereinabove set forth.

WHEREFORE, your petitioners, as such Board of Commissioners, respectfully pray the Court that upon the filing hereof with the Clerk of this court, the Judge of this court shall enter an order herein, setting this matter for hearing as by law required, and shall order the Clerk of this court to cause notice of the filing of said petition and the date of hearing thereof by publication of a notice at least once a week for two calendar weeks, in a newspaper published and of General circulation [29] in the county where the office of the said Board of Commissioners is situate, to wit, Treasure County, Montana, and also by posting a written notice in at least three public places in each of the divisions of said District, in manner as provided by law, and that upon said hearing the Court shall find and determine if the requirements of law, in such case made and provided, have been complied with, and shall examine and determine, and by a suitable and proper judgment and decree declare the regularity, legality and validity of the proceedings had by your petitioners, as such Board of Commissioners,

preliminary to the issuance of said bonds and to the levy and assessment of said special tax or assessment, for the payment of principal and interest of said bonds, and determine the legality and validity of said bonds, and said special tax as a whole, and thus will your petitioners ever pray.

L. S. PERKINS,
FLOYD UNGLES,
JEFFREY DINSDALE,
Petitioners.
By H. V. BEEMAN,
Their Attorney.

State of Montana,
County of Treasure,—ss.

L. S. Perkins, Floyd Ungles and Jeffrey Dinsdale, of lawful age, being first duly sworn, upon oath, each deposes and says:

That they are the petitioners named in the foregoing petition and are the duly appointed, qualified and acting members of the Board of Commissioners of the Big Horn-Tullock Irrigation District of the County of Treasure, Montana; and that they have read the foregoing petition and know the contents thereof, and that the matters and things therein stated and set forth are true to the personal knowledge of the affiants, and that said petition contains, among other things, a full, true and correct copy of the several petitions, orders, resolutions and proceedings therein set forth and referred to.

L. S. PERKINS. [30]
FLOYD UNGLES.
JEFFREY DINSDALE.

Subscribed and sworn to before me this 22d day of October, 1919.

[Notarial Seal] C. M. VREELAND,
Notary Public for the State of Montana, Residing at Big Horn, Montana.

My commission expires Apr. 29, 1922. [31]

EXHIBIT "A."

To the Commissioners of the Big Horn Tullock Irrigation District, Treasure County, Montana.

Gentlemen: We, the undersigned, being a majority in numbers of the holders of title, or evidence of title to the lands embraced within the Big Horn Tullock Irrigation District of the County of Treasure, State of Montana, and also representing a majority in acreage of the lands embraced therein,

DO RESPECTIVELY PETITION YOUR BOARD:

THAT WHEREAS, the said Board of Commissioners have formulated a plan for the reclamation and irrigation of the lands included within said district, and have caused accurate surveys, examinations and plans to be made, demonstrating the practicability of such plan of reclamation and irrigation in manner and form as provided by law, and under the direction and supervision of an irrigation engineer of well known standing and competency, and have in manner and form as by law required, in regular meeting assembled, and after report of said engineer had been filed with the Board of Commissioners, determined and ascer-

tained that the amount of money necessary to be raised for the construction and completion of the necessary irrigation system for the reclamation and irrigation of said lands in the sum of Seventy-five thousand and no/100 ($75,000.00) Dollars.

NOW, THEREFORE, we, the undersigned, owners of title or evidence of title, as aforesaid, do respectfully petition you, the said Board of Commissioners that you do cause to be issued in manner and form as provided by law, the negotiable coupon bonds of the said Big Horn-Tullock Irrigation District in the aggregate sum of Seventy-five Thousand and no/100 ($75,000.00) Dollars, which said bonds shall run for a period of not later than thirty (30) years from their date, and may contain clauses providing for prior redemption, and payment in whole or in part at the option of the Board of Commissioners of said District on any interest payment date, after five (5) years from their date, in such manner and form and at such time and in sums as may in the opinion of the said Board of Commissioners appear to be to the best interest of the District, which said bonds shall bear interest from their [32] date until paid at the rate not to exceed six (6) per cent per annum, payable annually or semi-annually, the installments of interest to be the date of maturity of principal of said bonds to be evidenced by appropriate coupons attached to each bond, said bonds and interest coupons to be payable at such place or places as the Board of Commissioners of said District shall prescribe, or if in the opinion of the said Board of Commission-

ers it shall be to the best interests of said District and the people thereof, said bonds to be issued to mature serially at such time and in such amounts as said Board of Commissioners shall decide. Said bonds to be issued in such denomination or denominations, and such form as the Board of Commissioners shall prescribe, and to be duly executed as by law required; the said Board of Commissioners to provide for the registration of said bonds, if in their discretion it shall appear to be to the best interests of the District, such bonds to be lien upon all of the lands originally or at any time included within said District, said bonds and the special tax or assessment for the payment of interest thereon, and the principal of said bonds to constitute a first, prior lien on the lands embraced within said District, and upon which the same may be levied, with like force and effect as taxes levied for State and county purposes.

We do further petition you, the said Board of Commissioners, that after the issuance of said bonds, and after the confirmation by the District Court as provided by law, that said bonds shall be negotiated and sold under and by direction of the Board of Commissioners in manner and form as provided by law, or issued in payment of the construction and completion of the irrigation system of the District in accordance with the plans of irrigation and reclamation adopted by your said Board, as in the discretion of the Board of Commissioners may appear to the best interests of said District and the people thereof, and we do hereby

ratify and confirm this bond issue hereby petitioned for and the special tax or assessments to be levied for the purpose of paying principal and interest thereon.

IN WITNESS THEREOF, We have hereunto set our hands at Big Horn, Montana, this 20th day of October, 1919.

W. E. UNGLES	Big Horn, Montana.
FLOYD UNGLES	Big Horn, Montana.
[33]	
JEFFREY DINSDALE	Big Horn, Montana.
W. M. UNGLES	Big Horn, Montana.
C. BADLANDS	Big Horn, Montana.
J. E. DINSDALE	Big Horn, Montana.
CHAS. T. DONNES	Big Horn, Montana.
D. Y. COOK	Big Horn, Montana.
JOHN TOPSICK	Big Horn, Montana.
NELLIE SMITH and ROBT. L. SMITH	Big Horn, Montana.
F. C. OWENS	Big Horn, Montana.
PASCUALE MAURO	Big Horn, Montana.
H. L. HOYLMAN	Big Horn, Montana.
J. W. McCOY	Big Horn, Montana.

State of Montana,
County of Treasure,—ss.

W. E. Ungles, of lawful age, being first duly sworn, upon oath deposes and says:

That he is well and intimately acquainted with each and all of the foregoing petitioners, and particularly acquainted with the handwriting of each of them, and that he knows of his own personal knowledge that the foregoing signatures are the

true and genuine signatures of the said petitioners and each of them. [34]

W. E. UNGLES.

Subscribed and sworn to before me this 20th day of October, 1919.

[Seal] C. M. VREELAND,
Notary Public for the State of Montana at Big Horn, Treasure County, Montana.

My commission expires April 29, 1922. [35]

EXHIBIT "*D.*"

Big Horn, Montana, October 22, 1919.

The Board of Commissioners of the Big Horn-Tullock Irrigation District in regular session.
Present: Jeffrey Dinsdale, President.
Floyd Ungles, Commissioner.
L. S. Perkins, Commissioner.
W. E. Ungles, Secretary.

The minutes of the *proceeding* meetings were read and on motion duly made, seconded and carried, were approved as read.

The Commissioners thereupon took up the consideration of the Petition which had heretofore been filed with them relative to the issuance of Seventy-five Thousand Dollars of coupon bonds of said Irrigation District, and after examining said Petition, and it appearing to the Commissioners that said Petition had been signed by a majority in number and acreage of the owners, holders of title or evidence of title, to the lands embraced within

said Irrigation District, and it appearing that said Petition was in all respects regular and had been properly and regularly signed and executed, pursuant to law, Commissioner Ungles introduced offered and moved the adoption of the following resolutions:

BE IT RESOLVED AND FOUND, by the Board of Commissioners of the Big Horn-Tullock Irrigation District of Treasure County, Montana, in regular meeting assembled, and having under consideration the Petition of the land owners within said District, praying for a bond issue in the sum of Seventy-five Thousand Dollars; that said Petition is signed by more than a majority in number and acreage of all of the holders of title or evidence of title, to the land included within said District, and that the issuance of said bonds was necessary to carry out the purpose for which said District was organized and properly and adequately irrigated and reclaim the lands therein. Whereupon the same being seconded by Commissioner Perkins, and upon the roll being called and Commissioners Dinsdale, Ungles and Perkins each voting "Aye," it was declared that the foregoing resolution and finding had been regularly and unanimously adopted.

Commissioner Ungles offered and moved the adoption of the following resolution:

BE IT RESOLVED, by the Board of Commissioners of the Big Horn-Tullock Irrigation District of Treasure County, Montana, in regular meeting assembled, that, [36]

WHEREAS, a Petition having been filed with the Board of Commissioners of said Big Horn-Tullock Irrigation District bearing the signature of the requisite number of holders of title or evidence of title to lands included within said District and representing the requisite amount of acreage therein, and praying for the issuance of coupon bonds of said District in the sum of Seventy-five Thousand Dollars, for the purposes therein set forth, and,

WHEREAS, this Board of Commissioners having under consideration the said Petition, has determined that it is necessary, in order to carry out the purpose for which said Irrigation District was organized and to adequately and properly reclaim the lands therein, to issue coupon bonds of the District in the sum of Seventy-five Thousand Dollars.

THEREFORE BE IT RESOLVED, by the Board of Commissioners of the Big Horn-Tullock Irrigation District, that the prayer of said Petition be, and the same is hereby granted, and that this Board does now by proper proceedings, orders and resolutions, provide for the issuance of said bonds as prayed for in said Petition and pursuant to the terms and provisions of Chapter 146 of the Acts of the Eleventh Legislative Assembly of the State of Montana and Acts amendatory thereto and in such manner and form and containing such provisions and conditions as may be, in the judgment of this Board of Commissioners, to the best interest of said District and the land owners therein,—Whereupon the same being seconded by Commis-

sioner Perkins, and the roll being called, and Commissioners Dinsdale, Ungles and Perkins each voting "Aye," it was declared that such motion had been unanimously carried and that said resolution had been adopted.

Thereupon the Board of Commissioners proceeded to discuss and consider the form and details of the bond issue prayed for by said Petition, and Commissioner Ungles offered and moved the adoption of the following resolution:

A RESOLUTION

PROVIDING FOR THE ISSUANCE AND SALE OF THE COUPON BONDS OF THE BIG HORN-TULLOCK IRRIGATION DISTRICT OF TREASURE COUNTY, MONTANA, FOR THE PURPOSE OF PROVIDING NECESSARY FUNDS FOR THE ACQUIRING OF THE NECESSARY WATER AND WATER RIGHTS AND THE PURCHASE, CONSTRUCTION AND INSTALLATION OF IRRIGATION DITCHES, MACHINERY, EQUIPMENT, PROPERTY AND IRRIGATION SYSTEM TO PROPERLY AND ADEQUATELY IRRIGATE AND RECLAIM THE LANDS WITHIN SAID DISTRICT. AND FOR CARRYING OUT OF THE PURPOSE FOR WHICH SAID DISTRICT WAS CREATED AND ORGANIZED; FOR PRESCRIBING THE FORM AND [37] DETAILS OF SAID BONDS AND PROVIDING FOR THE

LEVYING OF A SPECIAL TAX OR ASSESSMENT ON THE LANDS IN SAID DISTRICT, SUFFICIENT IN AMOUNT TO PAY THE PRINCIPAL AND INTEREST ON SAID BONDS WHEN DUE; AND FOR THE CONFIRMATION OF THE PROCEEDINGS OF THE BOARD OF COMMISSIONERS OF SAID DISTRICT IN RELATION THERETO, BY THE DISTRICT COURT OF THE FIFTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF TREASURE.

BE IT RESOLVED, by the Board of Commissioners of the Big Horn-Tullock Irrigation District, of Treasure County, Montana, in regular meeting assembled:

That (the) bonds of said Big Horn-Tullock Irrigation District in an amount not exceeding the sum of Seventy-five Thousand Dollars, be issued for the purpose of providing the necessary funds for constructing the necessary irrigation canals and works and acquiring the necessary property and rights thereof and meeting the expense incident thereto, and for the purpose of acquiring by purchase, water rights, canals and irrigation works, constructed and partially constructed, and for the purpose of acquiring and providing an adequate system of irrigation works for said canal; that said bonds shall be 150 in number, numbered consecutively from one (1) to one hundred fifty (150) both inclusive,

of the denomination of Five Hundred Dollars ($500.00) each.

Said bonds shall mature serially, beginning with number one (1); the first fifteen of said bonds shall mature January 1, 1926; and each year thereafter fifteen of said bonds shall mature, and the last of said bonds, numbered from one hundred thirty-six (136) to one hundred fifty (150), both inclusive, shall mature January 1, 1935, said bonds shall bear interest at the rate of six per cent (6%) per annum, payable annually on the first day of January of each year, at the office of the County Treasurer of Treasure County, Montana; both principal and interest of said bonds shall be payable in gold coin of the United States.

The form of said bonds and interest coupons thereto attached, except as to the numbers and distinguishing marks, shall be as follows, to wit:

(BOND)

United States of America, $500.00
State of Montana. No.———

Big Horn-Tullock Irrigation District
Six Per Cent Gold Bond.

[38]

FOR VALUE RECEIVED, Big Horn-Tullock Irrigation District, a public corporation, organized, existing and doing business under and by virtue of the laws of Montana, with its principal place of business at Big Horn, in Treasure County, Mon-

tana (hereinafter called the District), promises to pay to the bearer, or, if this bond is registered, then to the registered holder thereof, the sum of Five Hundred Dollars in gold coin of the United States of America, of the present standard of weight and fineness, on the 1st day of January, 1926, at the office of the County Treasurer of Treasure County, Montana, together with the interest thereon from the date hereof at the rate of six per cent per annum, payable annually in like gold coin on the first day of January of each year during the period of this bond, at the office of the said County Treasurer, upon presentation and surrender of the respective coupons thereto attached as they severally become due and payable.

This bond and the coupons hereto attached are payable without any deduction for tax or taxes which said district may be required to pay or retain therefrom under or by reason of any future law of the United States of the state of Montana. Said district agrees that in the event it shall be required to pay such taxes, such payment shall not be chargeable against or collectible from the owner or holder of this bond.

This bond is one of a series of one hundred fifty coupon bonds, numbered from one (1) to one hundred fifty (150), both inclusive, and being each of the denomination of $500, all being of like tenor, date and effect, except as to date of payment, and all issued under the provisions of Chapter 146, of the Session Laws of 1909 of the State of Montana,

and the Amendments thereto, and all equally secured by the lien on the land in said district as provided for in said Chapter and said Amendments, and which is a first lien upon said lands.

This bond shall pass by delivery unless it has been registered upon the books of the secretary of the Board of Commissioners of said District, and may be so registered as to the principal thereof upon application to such Secretary. Such registration of ownership shall be duly noted thereon, and after such registration no transfer shall be valid unless it be made upon the books of said Secretary by the registered holder thereof in person or by attorney duly authorized and similarly noted hereon. This bond may, however, be discharged from the [39] effect of such registration by being transferred on the said books to the bearer, and thereafter transferability by delivery shall be restored. It may, however, from time to time be again registered or again transferred to bearer as before. Such registration shall not, however, affect the negotiability of the coupons, which shall always be transferable by delivery merely.

Fifteen of said bonds shall be paid January 1, 1926, and each year thereafter fifteen of said bonds shall mature, and the last of said bonds numbered from one hundred thirty-six (136) to one hundred fifty (150), both inclusive, shall mature January 1, 1935, said bonds being paid in the order of their numbers.

IN WITNESS WHEREOF, said Big Horn-Tullock Irrigation District has caused this bond to be

executed in its corporate name, signed by its President, attested by its Secretary, and has also caused its corporate seal to be affixed hereto, and in addition thereof, has caused coupons for the interest hereon, bearing the engraved facsimile signature of the President and Secretary to be attached, this first day of November, A. D. 1919.

BIG HORN-TULLOCK IRRIGATION DISTRICT.

By ————————,
President Board of Commissioners.

Attest: ————————,
Secretary.

The coupons attached to said bonds with the exception of the first shall be in the following form:

On the first day of January, 19——, the Big Horn-Tullock Irrigation District, will pay to the bearer at the office of the County Treasurer of Treasure County, Montana, Thirty Dollars ($30) in gold coin, free from all taxes, being one year's interest on its six per cent (6%) gold bond Number ———.

BIG HORN-TULLOCK IRRIGATION DISTRICT.

By ————————,
President.

Attest: ————————,
Secretary.

The first coupon shall be of like tenor and effect, except as to the amount payable and the length of time interest has accumulated.

BE IT FURTHER RESOLVED, That the Board of Commissioners of said District shall annually, at the time and in the manner prescribed by law, for the first four years after the issuance of said bonds, levy a special tax and assessment against all lands in said district for the irrigation and benefit of which said district was organized [40] and said bonds were issued, sufficient to pay the interest on said bonds and maintenance of said irrigation system, and thereafter shall annually, within the time and in the manner prescribed by law, levy a special tax and assessment upon said bonds and the principal of said bonds which shall mature within the next year, and the cost of maintenance of such irrigation system.

BE IT FURTHER RESOLVED, That the Board of Commissioners within ten days of this date, prepare the necessary Petition and other papers and file same in the District Court of the Fifteenth Judicial District of the State of Montana, in and for the County of Treasure, for the confirmation of all proceedings had with reference to the issuance of said bonds.

BE IT FURTHER RESOLVED, That the said bond issue herein shall be issued, negotiated, sold by or under the direction of the Board of Commissioners of said District, and said Bonds, issued herein, may, at the discretion of the Board of Commissioners be issued direct in payment and satisfaction of any contract for the acquiring of necessary water and water rights and the purchases, construction and installation of the irrigation ditches,

machinery, equipment, property, and irrigation system to properly and adequately irrigate and reclaim the lands within the said District, and the proceeds thereof, if sold in whole or part, shall be delivered to the County Treasurer of Treasure County, Montana, in manner and form as provided by law, to be placed to the credit of said District, and to be paid out by said County Treasurer as provided by law.

Whereupon the motion for the adoption of the foregoing resolution being seconded by Commissioner Perkins, the same having been read and considered by the Board of Commissioners, and the roll being called and Commissioners Dinsdale, Ungles and Perkins each voting "Aye," said resolution was declared passed and adopted by the unanimous vote of the Board of Commissioners and ordered spread upon the records of this meeting.

It was duly moved and seconded that Henry V. Beeman as Attorney and Counsel for the Board of Commissioners, be and he is hereby authorized and instructed to prepare at once and file in the District Court of the Fifteenth Judicial District of the State of Montana, in and for the County of Treasure a Petition for the ratification, approval and confirmation of the bond issue and special tax or assessment provided for by the foregoing resolutions; and upon the roll being called, and Commissioners Dinsdale, Ungles and Perkins each voting "Aye," it was declared that said motion had been unanimously [41] passed and adopted.

Upon motion duly made, seconded and carried the Board of Commissioners adjourned *sine die.*

Approved: JEFFREY DINSDALE,
President.

Attest: W. E. UNGLES,
Secretary.

In the District Court of the Fifteenth Judicial District of the State of Montana, in and for the County of Treasure.

State of Montana,
County of Treasure,—ss.

W. E. Ungles, of lawful age, being first duly sworn, upon oath, deposes and says:

That he is the duly appointed, qualified and acting Secretary of the Board of Commissioners of the Big Horn-Tullock Irrigation District of Treasure County, Montana, and that the several petition, minutes, proceedings and orders set forth herein and made a part of the foregoing petition as exhibits thereto, are full, true, and correct copies of said several petitions, minutes, proceedings and orders as they appear upon the records of the Board of Commissioners of said District, and on file in his office.

W. E. UNGLES.

Subscribed and sworn to before me this 22d day of October, 1919.

[Notarial Seal] HENRY V. BEEMAN,
Notary Public for the State of Montana, Residing at Forsyth, Montana.

My commission expires April 4, 1922.

[Indorsed]: Filed Oct. 24, 1919. J. D. Clark, Clerk. By F. M. Clark, Deputy. [42]

In the District Court of the Fifteenth Judicial District of the State of Montana, in and for the County of Treasure.

In the Matter of the Issuance of Seventy-five Thousand Dollars of the Coupon Bonds of the BIG HORN-TULLOCK IRRIGATION DISTRICT OF TREASURE COUNTY, MONTANA.

ORDER FIXING DAY FOR HEARING ON PETITION.

The petition of L. S. Perkins, Floyd Ungles and Jeffrey Dinsdale, as the Board of Commissioners of the Big Horn-Tullock Irrigation District of Treasure County, Montana, having heretofore been filed with the Clerk praying for ratification, confirmation and approval of a bond issue of the Big Horn, Tullock Irrigation District in the sum of Seventy-five Thousand Dollars, for carrying out the purposes for which said Irrigation District was organized, and praying for the confirmation of said bonds, and the ratification, confirmation and approval of the special tax and assessment levied for the purpose of providing funds for the payment of the principal and interest on said bonds, as the same shall become due and payable, and said Petition being this day presented to the Court:

IT IS HEREBY ORDERED, that the time of the hearing of said Petition be and the same is hereby fixed and set for the 17th day of November, 1918, at the courtroom in the courthouse in the town of Hysham, Treasure County, Montana, the county wherein said district is situated, at the hour of 10 A. M. of said day. And the Clerk of this court is hereby ordered to give notice of the filing of said Petition, and the day of the hearing thereon, by the publication of notice thereof in manner and form as by law required, in the "Hysham Echo," a newspaper of general circulation, published in said County of Treasure, for two calendar weeks, and also by posting a written or printed copy thereof in at least three public places in each of the divisions of said Big Horn-Tullock Irrigation District. The first publication thereof and such posting to be made and done not less than fifteen days prior to the day fixed for said hearing.

Dated this 24th day of October, 1919.

GEO. P. JONES,
Judge of District Court.

[Indorsed]: Filed Oct. 24, 1919. J. D. Clark, Clerk. By F. M. Clark, Deputy. [43]

In the District Court of the Fifteenth Judicial District of the State of Montana, in and for the County of Treasure.

In the Matter of the Issuance of Seventy-five Thousand Dollars of the Coupon Bonds of the BIG HORN-TULLOCK IRRIGATION DISTRICT OF TREASURE COUNTY, MONTANA.

DECREE.

On this 17th day of November, 1919, the petition of L. S. Perkins, Floyd Ungles and Jeffrey Dinsdale, the duly appointed qualified and acting Board of Commissioners of the Big Horn-Tullock Irrigation District of the County of Treasure, State of Montana, filed in this court on the 24th day of October, 1919, and praying for the ratification, confirmation and approval of a bond issue of said Big Horn-Tullock Irrigation District in the sum of Seventy-five Thousand Dollars, the proceedings relative thereto, and a special tax or assessment levied for the payment of the principal and interest on said bonds, coming regularly on to be heard pursuant to the prior order of this Court made and entered in this cause on the 24th day of October, 1919, fixing and appointing the 17th day of November, 1919, as the time for the hearing thereof, and said petitioners appearing in person and by counsel and no person or persons, corporations or firms, having appeared either by counsel or otherwise, for the

purpose of objecting or opposing said petition; the Court proceeded with the hearing thereof.

Thereupon, upon proof heard by the Court, and the Court being fully advised in the premises, it was by the Court found and determined.

That due and legal notice of the hearing of said petition had been given by the Clerk of this court within the time, and for the length of time and in the manner and form provided for by law, and the prior order of this Court.

That the Big Horn-Tullock Irrigation District was created by a judgment of this Court, duly made and entered as in said petition set forth, that the petitioners herein are the duly appointed, qualified and acting, Commissioners of said Big Horn-Tullock Irrigation District; that heretofore all of the proceedings, acts, matters and things set forth in said petition have been done and performed in manner and form as alleged therein, in a strict conformity with the provisions of the law of the State of Montana, relative thereto, and that all proceedings and things requisite and necessary to be done precedent to the issuance of said bonds, and the levy of the special tax for the payment of the principal of, and the interest [44] on said bonds, have been done and performed in regular and due time, form and manner and in all respects as by law required.

That each and all of the requirements and provisions of Section 40 and Chapter 146 of the Acts of the Eleventh Legislative Assembly of the State of Montana, and all acts amendatory thereof and supplemental thereto, have been fully complied with.

That all of the proceedings relative to the issuance of said bonds, and the levy of the special tax of assessment for the payment of the principal of and the interest on said bonds referred to in the petition herein filed are regular, legal and valid.

That said bonds have been regularly, legally and validly issued, and that the special tax or assessment so levied for the payment of the principal of, and the interest on said bonds, has been regularly, legally and validly levied and assessed, and that each and all of the actions taken by the Board of Commissioners of said Big Horn-Tullock Irrigation District, in connection therewith, have been regularly, legally and validly done in manner and form as provided by law.

WHEREFORE, by reason of the law and the premises, it is by the Court ORDERED, ADJUDGED AND DECREED that the proceedings had, held, taken and enacted by the Board of Commissioners of the Big Horn-Tullock Irrigation District of the County of Treasure, State of Montana, in relation to the issuance of Seventy-five Thousand Dollars of bonds of said District, and the levy and assessment of the special tax or assessment for the payment of the principal of and the interest on said bonds, and the same is hereby ratified, approved, confirmed and declared valid as a whole.

That said bond issue be and is in the aggregate sum of Seventy-five Thousand Dollars numbered from 1 to 150, both inclusive, each of said bonds being in the denomination of Five Hundred Dollars,

and each and all of said bonds shall bear the date of November 1, 1919. That said bonds shall mature serially, beginning with number 1, the first fifteen of said bonds shall mature January 1, 1926, and each year thereafter fifteen bonds shall mature, the last of said bonds, numbered from 136 to 150, both inclusive, shall mature January 1, 1935; said bonds shall bear interest at the rate of six per cent per annum, payable annually on the 1st day of January of each year, at the office of the county treasurer of Treasure County, Montana, both principal and interest of said bonds shall be payable in [45] gold coin of the United States, said bonds being particularly described and set forth in the petition filed herein.

That said bonds be and the same are hereby ratified, approved and confirmed and declared to be and constitute a lien upon all of the lands now within, or at any time hereafter included in said Big Horn-Tullock Irrigation District, except upon such lands as may be at any time included in said District, on account of the exchange or substitution of water as provided for by law.

That the special tax or assessment levied or assessed, as set forth in the petition herein, and in the proceedings of the said Board of Commissioners of the Big Horn-Tullock Irrigation District, be, and the same is hereby, ratified, approved and confirmed as a whole, and declared to be and constitute hereby a lien upon all of the lands now within, or at any time hereafter included in said District for the irrigation and benefit of which said District was

organized, except upon such lands as may at any time be included within said District on account of the exchange or substitution of water as provided for by law, and that all of the lands in said District, at the time of the issuance of said bonds, and all lands now within said District, and all lands subsequently included therein, which are so chargeable under the provisions of law, shall be and remain liable to be taxed and assessed as provided for by said special tax or assessment so levied for the payment of said bonds, and the interest thereon.

Done in open court this 17th day of November, 1919.

GEO. P. JONES,
Judge of District Court.

[Indorsed]: Filed November 17, 1919. J. D. Clark, Clerk. By F. M. Clark, Deputy.

[Endorsed]: Bill of Complaint. Filed September 13, 1927. C. R. Garlow, Clerk. [46]

AND THEREAFTER, and on the 29th day of November, 1913, the defendants, Union Trust Company, a corporation, and Spokane & Eastern Trust Company, a corporation, filed herein their motion to dismiss, which said motion is as follows, to wit: [47]

[Title of Court and Cause.]

MOTION TO DISMISS.

Now come the defendants, Union Trust Company, a corporation, and Spokane & Eastern Trust Company, a corporation, in said above-entitled cause, and move the Court to dismiss the said complainants' bill of complaint on file herein as to these moving defendants, upon the grounds and for the reasons:

1. That the said amended bill of complaint does not state sufficient facts to constitute a valid cause of action in equity against these moving defendants, or either of them, in that the said bill of complaint does not set forth any matter of equity entitling the said complainants, or either of them, to the relief prayed for therein, or any relief; and no facts are stated in said bill of complaint sufficient to entitle said complainants, or either of them, to any relief against these moving defendants, or either of them.

WHEREFORE, these moving defendants pray the judgment of the Court whether they, or either of them, shall further answer [48] said bill of complaint; and that they be dismissed with their costs.

GUNN, RASCH, HALL & GUNN,
Solicitors for Defendants, Union Trust Company and Spokane & Eastern Trust Co.
M. S. GUNN,
Of Counsel. [49]

[Title of Court and Cause.]

AFFIDAVIT OF M. S. GUNN.

State of Montana,
County of Lewis and Clark,—ss.

M. S. Gunn, being first duly sworn, deposes and says:

That he is one of the solicitors for the defendants, Union Trust Company and Spokane & Eastern Trust Company, in said above-entitled cause, and resides and has his office the same as the other solicitors whose names are subscribed as such to the foregoing motion to dismiss the complainants' bill of complaint, in the City of Helena, Lewis and Clark County, State of Montana. That the solicitors for said complainants in said cause are Mr. John A. Shelton and Mr. W. N. Waugh, whose residences, offices, and places of business are in the City of Butte, Silver Bow County, Montana. That there is direct communication by United States mail between the said City of Helena, affiant's place of residence and business, and the said City of Butte, the place of residence and business of said solicitors for complainants. That affiant on the 29th day of November, 1927, at the hour of 10 P. M., [50] deposited in the United States postoffice at Helena, Montana, enclosed in an envelope securely sealed and with the necessary and proper amount of postage thereon prepaid, and addressed to said Mr. John A. Shelton, Attorney at Law, Butte, Montana, for transmission by said United States mail and

delivery to said John A. Shelton, a true, correct and accurate copy of the foregoing motion of said defendants, Union Trust Company and Spokane & Eastern Trust Company, for the dismissal of said complainants' bill of complaint, upon the grounds specifically stated therein.

M. S. GUNN.

Subscribed and sworn to before me this 29 day of November, 1927.

[Notarial Seal] E. M. HALL,

Notary Public for the State of Montana, Residing at Helena, Montana.

My commission expires Aug. 5, 1928.

Filed November 29, 1927. [51]

AND THEREAFTER, to wit, on the 3d day of August, 1928, the Court made and filed herein its decision as follows, to wit: [52]

[Title of Court and Cause.]

DECISION.

Plaintiffs are owner and mortgagee of lands within a statutory irrigation district, and defendants are owners of bonds and warrants by the district issued for construction and maintenance, owners of other like lands, and the collector of taxes levied upon the lands to pay said obligations.

The relief sought is annulment of the proceedings of the state court establishing the district, and avoidance of the liens of the taxes.

Some of the owners of bonds and warrants move to dismiss the complaint for that it is insufficient for any relief. The motion is granted in respect to all defendants.

The district was created and the bonds issued in 1919; the taxes were imposed and the warrants issued for several succeeding years were paid in 1920 but not thereafter, and because of the delinquency the lands were sold in 1922; and this suit was begun in 1927.

Referring to Tomich alone, the others in poorer case, although he did not sign the petition to create the district, it included his lands, he had notice thereof, was at least a passive participant, did not resort to the statutory remedies to defeat or correct organization, inclusion of his lands, or taxes, paid the latter in 1920, and in consequence he acquiesced and is estopped to maintain this unduly delayed suit or to otherwise complain, whatever be the mere irregularity in *any the* proceedings. He stood silent when he should have spoken and will not be heard to speak now. See the cases cited by defendants, and 266 U. S. 269; 267 U. S. 487. He contends, however, that prior to organization his lands were irrigated, that the statute provides none such shall be included save with the owner's written consent, that he did not consent, and that in consequence the Court was without jurisdiction to include his lands and to that extent the proceedings are void. In this, he fails to distinguish between jurisdiction or power, and duty. See 210 U. S. 235, and jurisdiction generally. The Court had jurisdiction over all the

lands embraced in the petition and power to include them in the district. Its duty was to include no lands whereof the evidence before it was that they were already irrigated, without written consent of the owner. To this extent the case may be like any other wherein the Court has jurisdiction, and despite its duty renders judgment in favor of a cause of action not proven, viz., the judgment is subject to defeat on appeal, but is impregnable to collateral attack. Or, being a matter of mere evidence and not jurisdiction, it will be conclusively presumed the evidence warranted the Court's judgment. In either case, Tomich is concluded by the proceedings and cannot impeach them herein. The foregoing principles foreclose all other contentions made, and the latter need no particular comment. Some of them are based on vague and ambiguous allegations and conclusions, suggestive of evasion of direct statement beyond supporting fact, as though in hope to set out a *prima facie* case.

The situation is simply this: This irrigation project was ill advised or mismanaged, and disaster followed. Plaintiffs would escape the consequences by shifting the loss to defendants who supplied the money for the enterprise. It just cannot be done, at least not in a court of equity.

Decree for defendants.

Aug. 3, 1928.

BOURQUIN, J.

Filed August 3, 1928. [53]

AND THEREAFTER on the 9th day of August, 1928, the Court made and filed herein its final decree, which was entered of record as follows, to wit:

In the District Court of the United States in and for the District of Montana.

T. TOMICH, HARRY F. SCOTT, and H. MULBERGER,

Complainants,

vs.

UNION TRUST COMPANY, a Corporation, SPOKANE & EASTERN TRUST CO., a Corporation, BIG HORN TULLOCK IRRIGATION DISTRICT, a Corporation, ASH SHEEP COMPANY, a Corporation, E. J. McCORMICK, County Treasurer of Treasure County, Montana, CHARLES P. DONNES, H. L. HOYLMAN, JEFFREY DINSDALE, H. M. SRITE, NICK TOPSICK, PETER BONGUNONVICH, FLOYD UNGLES, C. M. VREELAND, JOHN LIGHTBODY, ROBERT E. CLEARY, and N. P. MARSHALL,

Defendants.

FINAL DECREE.

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ORDERED, ADJUDGED, and DECREED as follows:

That the bill of complaint herein be, and the same hereby is dismissed as to all of the defendants.

Dated this 9th day of August, A. D. 1928.

BOURQUIN,
Judge.

Filed and entered Aug. 9th, 1928. [54]

AND THEREAFTER, to wit, on the 8th day of November, 1928, assignment of errors was filed herein, which is in the words and figures as follows, to wit: [55]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Come now the complainants herein and assign errors in the decision and in the decree of the United States District Court of the District of Montana made and rendered herein on the 4th day of August, 1928, and the 9th day of August, 1928, respectively, as follows:

First: The Court erred in sustaining the motion of the defendants Union Trust Company and Spokane & Eastern Trust Co. to dismiss the bill herein.

Second: The Court erred in holding and decreeing that the bill herein should be dismissed as to all defendants.

Third: The Court erred in its decision herein in ignoring the contention of complainants that warrants alleged to have been issued by Big Horn Tullock Irrigation District were void because the in-

debtedness for which the said warrants were issued exceeded the limitation prescribed by the Montana Irrigation District Act.

In order that the foregoing assignment of errors may appear of record, the complainants present the same to the Court and pray that such disposition may be made thereof as is in accordance with the laws and statutes of the United States in such cases made and provided, and complainants pray a reversal of the decree dismissing the bill herein.

JOHN A. SHELTON,
Solicitor for Complainants.

Filed Nov. 8, 1928. [56]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the U. S. Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 67 pages, numbered consecutively from 1, to 67, inclusive, is a true and correct transcript of the record and proceedings had in the within-entitled cause and of the whole thereof required, by praecipe filed, to be incorporated in said transcript, as appears from the original records and files of said court and cause in my custody as such Clerk; and I do further cer-

tify and return that I have annexed to said transcript and included within said pages the original citation issued in said cause.

I further certify that the costs of said transcript amount to the sum of Eight and no/100 Dollars ($8.00), and have been paid by the appellants.

WITNESS my hand and the seal of said court at Butte, Montana, this 18th day of December, A. D. 1928.

[Seal] C. R. GARLOW,
Clerk.
By L. R. Polglase,
Deputy. [67]

[Endorsed]: No. 5664. United States Circuit Court of Appeals for the Ninth Circuit. T. Tomich, Harry F. Scott and H. Mulberger, Appellants, vs. Union Trust Company, a Corporation, and Spokane & Eastern Trust Company, a Corporation, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Filed December 21, 1928.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 5664.

T. TOMICH et al.,

Appellants,

vs.

UNION TRUST COMPANY et al.,

Appellees.

STATEMENT OF ERRORS UPON WHICH THE APPELLANT INTENDS TO RELY AND THE PARTS OF THE RECORD WHICH HE CONSIDERS NECESSARY FOR THE CONSIDERATION THEREOF.

Come now the appellants herein and in pursuance of Rule 23, subdivision 8, state:

First: That they intend to rely upon all of the errors assigned in the assignment of errors included in the transcript on appeal herein.

Second: That they consider necessary for the consideration thereof the following portions of the transcript on appeal herein, to wit:

Bill of complaint,
Motion to dismiss,
Decision of the Court below,
Decree in the court below, and
Assignment of errors,

and all other portions of the said transcript the ap-

pellant considers unnecessary for the consideration thereof.

JOHN A. SHELTON,
Solicitor for Appellant.

Due service of the above and foregoing paper by copy thereof admitted this —— day of December, 1928.

M. S. GUNN,
Solicitor for Appellees.

[Endorsed]: Statement of Errors upon Which the Appellant Intends to Rely and the Parts of the Record Which He Considers Necessary for the Consideration Thereof. Filed Jan. 12, 1929. Paul P. O'Brien, Clerk.

No. 5664

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit.

T. TOMICH ET AL.,

Appellants,

vs.

UNION TRUST COMPANY ET AL.,

Appellees.

BRIEF OF APPELLANTS.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA.

W. N. WAUGH,
JOHN A. SHELTON,
Solicitors for Appellants.

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United States

Circuit Court of Appeals

For the Ninth Circuit.

T. TOMICH, HARRY F. SCOTT, and H. MULGERGER,

Appellants,

vs.

UNION TRUST COMPANY and SPOKANE & EASTERN TRUST CO.,

Appellees.

and

FEDERAL LAND BANK OF SPOKANE, BIG HORN-TULLOCK IRRIGATION DISTRICT, ASH SHEEP CO., E. J. McCORMICK, County Treasurer of Treasure County, Montana, CHARLES P. DONNES, H. L. HOYLMAN, W. H. UNGLES, JEFFREY DINSDALE, H. M. SHRITE, NICK TOPSICK, D. Y. COOK, PETER BOGUNOVICH, CHARLES BADLANDS, JOHN TOPSICK, FLOYD UNGLES, J. V. McCOY, PASCOE FAURO, JOSEPH PONESA, JESS HINSDALE, TONY FAURO, ROBERT E. CLEARY, and H. F. MARSHALL,

Defendants.

BRIEF OF APPELLANTS.

STATEMENT OF THE CASE.

The respondents, Union Trust Company and Spokane & Eastern Trust Company, are the only defendants who appeared. They filed a motion to dismiss the bill, which motion was sustained and a decree was entered which dismissed the bill as against all defendants. All the allegations of the bill are admitted by the motion to dismiss.

It will only be necessary to consider the case as it affects one only of the appellants, for if the case as made by one of them requires a reversal the decree appealed from must be reversed as to all of them.

It appears from the bill that on June 26, 1919, there was a paper writing designated as a petition for the formation of an irrigation district filed in the office of the Clerk of the Montana Fifteenth Judicial District Court in and for the County of Treasure; that such proceedings were had thereon that there was an attempt to organize a so-called irrigation district to be called and designated as Big Horn-Tullock Irrigation District, this so-called district to embrace 1,599.22 acres situated in Treasure County, Montana, and included 100 acres which belonged to Tomich, who was a complainant; that on the 26th day of June, 1919, there was in existence a system of irrigation by which water was supplied to the lands owned by the said complainant; that his said lands were then under

irrigation; that there were water rights appurtenant thereto, and that the said complainant did not consent to the inclusion of his lands within the said district, never at any time participated in the organization of the said district, but at all times opposed the same and opposed the inclusion of his said lands therein; that upon the so-called organization of the said district proceedings were taken by which there was an unsuccessful attempt to provide a system of irrigation for said district; that for the discharge of expenses connected therewith bonds were issued amounting to $75,000 and in addition thereto warrants were issued amounting to $24,458.03, all of which, if the law was valid, would constitute a lien which with interest amounts to more than $120,000 or more than $75.00 per acre for each acre of land within the district; that for the purpose of payment of the said bonds and warrants and interest thereon taxes have been attempted to be annually levied on the lands in the said district except in the year 1922, and such proceedings have been taken with reference to the said taxes so attempted to be levied that the same appear in the offices of the county clerk and treasurer of said county as tax liens upon all of the said land including that of Tomich; that the said lands were attempted to be sold for the said taxes in 1922 and were bid in by the county of Treasure at such sale, and that steps are threatened to be taken by which a tax deed will be issued to the said county for the said lands; that the said lands on the said 26th day of June, 1919, were of the value

of $75.00 an acre; that the value of the said lands could not possibly be increased in value by the completion and successful operation of the proposed irrigation system in an amount exceeding $25.00 per acre; that since the year 1919 no water has been furnished for the irrigation of the said lands, the said ditches and canals which were then in use have been destroyed by the acts of said irrigation district, and buildings and other improvements on the said lands have fallen into decay; as a consequence of the lack of water for irrigation the said lands have not been cultivated and have grown up in weeds; that if the said bonds and warrants constitute a lien upon the lands of the complainant the same have been rendered valueless by the acts of the said irrigation district; that the proceedings for the attempted organization of the said irrigation district were invalid; that

Section 7167, R. C. M. 1921,

provides that the petition for the organization of such district shall set forth the character of the works, water rights, canals and other property proposed to be acquired or constructed for irrigation purposes in the proposed district, and

Section 7168, R. C. M. 1921,

provides that on the filing of such a petition the Clerk shall cause a copy of the same to be published together with a notice of the time and place on which it will be heard; that the so-called petition filed on the said 26th day of June wholly failed to set forth generally or at all the charac-

ter of the works, water rights or canals proposed to be constructed or acquired for irrigation purposes in the proposed district; that the said petition inferentially stated that such works proposed to be constructed consisted of the extension of a canal at an expense not exceeding $3,000, but as a matter of fact the irrigation work actually proposed to be constructed was besides the extension of the canal, the building of a dam across the Big Horn River at a cost of not less than $72,000; that the only notice given of the said proceedings was the publication of said petition and a notice that the same would be heard on a certain date; that proceedings were had in the said court whereby the so-called organization of the said district was undertaken to be confirmed and validated; that the amount involved in the said proceedings as it affected each of the complainants exceeded the sum or value of $3,000 exclusive of interest and costs; that respondents Union Trust Company and Spokane & Eastern Trust Company are the owners and holders of a portion of the said bonds and a portion also of the said warrants; they knew at all of the times mentioned in the bill that the said petition for the formation of the said district and the notice thereof was defective and insufficient in the particulars stated; that the lands of the complainant Tomich were under irrigation on and prior to the said 26th day of June and had water rights appurtenant thereto; that Tomich did not consent to the inclusion of his lands in the said district;

that the bonds and warrants issued exceeded the benefits which could possibly accrue to the said lands as a result of the said proposed improvements and the taxes for the payment thereof would necessarily be confiscatory of the said lands; that the county treasurer of the said county refused to receive payment of the taxes levied for state and county purposes unless payment was also made of the taxes levied by the said commissioners of the said so-called district; that the complainant Tomich tendered every year payment of the said state and county taxes but such tender was refused by the said county treasurer.

The relief asked is a decree removing the cloud upon the title of complainants to their said lands cast by the said proceedings of said so-called irrigation district, enjoining the execution of a tax deed to the county and declaring the said so-called irrigation district act to be violative of the Constitution of the United States. (Tr. 1 et seq.)

SPECIFICATION OF ERRORS RELIED UPON.

(1) The Court erred in sustaining the motion of the defendants Union Trust Company and Spokane & Eastern Trust Company to dismiss the bill.

(2) The Court erred in deciding that the said Fifteenth Judicial District Court had jurisdiction to include the lands of complainant Tomich within the said district.

(3) The Court erred in deciding that said act is not in conflict with Section 2, Article III and paragraph second of Article VI of the Constitution and sections 24 and 28 of the Judicial Code of the United States.

(4) The Court erred in deciding that the said so-called irrigation district act is not violative of the Fourteenth Article of Amendment to the Federal Constitution in that it permitted the issuance of bonds and warrants in such an amount as to require confiscatory taxation for their payment, but if it did not so permit, that said bonds and warrants are void because their issuance was not authorized by law.

BRIEF OF ARGUMENT.

Before entering upon a discussion of the law points involved in the case another matter requires brief notice. The respondents say that they should not lose the money which they invested in the enterprise since they invested their money in good faith in the bonds and warrants offered to them upon the credit of the district. In answer to this Tomich says a loss by the respondents is, of course, something to be regretted, but as between Tomich and the respondents the equities are in his favor. They acted without any invitation from him with full knowledge of the facts which might affect the value of the securities and should be held to have accepted the risk, while the circumstances which threaten a total destruction of the value of Tomich's property

are due entirely to the acts of others for which he is in no way responsible.

I.

THE SAID MONTANA FIFTEENTH JUDICIAL DISTRICT COURT HAD NO JURISDICTION TO INCLUDE THE LAND OF THE COMPLAINANT TOMICH IN THE SAID SO-CALLED DISTRICT.

Our contention in support of the first point is wholly disconnected from the contention which we make elsewhere with respect to the validity of the said so-called irrigation district act. For the present we assume that the said law is valid. The point which we now make is that assuming that the law is a valid law the court had no jurisdiction to include in the district any land which was then under irrigation. By the record here it is an established fact that the land of Tomich was on the 26th day of June, 1919, under a system of irrigation by which water was applied to the said land and there were water rights appurtenant thereto. Tomich did not consent to the inclusion of his lands in the said district and did not participate in the organization of the said district.

In 1909 the legislature of Montana had undertaken to pass an irrigation district act which was subsequently amended and as amended appears as Sections 7166 to 7264, R. C. M. 1921. It provides in Section 7169, R. C. M. 1921:

"Nor shall any lands which will not, *in the judgment of the Court,* be benefited by irrigation by means of said system of works, nor shall lands already under irrigation, nor lands having water rights appurtenant thereto, nor lands that can be irrigated from sources more feasible than the district system, be included within such proposed district, unless the owner of such lands shall CONSENT IN WRITING TO THE INCLUSION OF SUCH LANDS IN THE PROPOSED DISTRICT * * * provided, however, that where a district is formed to co-operate with the United States, lands previously irrigated and having water rights appurtenant thereto may be included within the district boundaries, *if it shall appear to the court* that the same will be benefited thereby."

The statute provides for two cases in which lands are already under irrigation or have water rights appurtenant thereto. One of them is the case where a district is formed to co-operate with the United States, in which case such land is not to be included in the district *unless it shall appear to the Court that such land would be benefited thereby.* The other case is where a district is formed but not to co-operate with the United States, in which case such lands cannot be included without the owner's consent in writing. In the one case there is plainly a discretionary power vested in the Court and in the other there is not, and in the latter case the Court is given

no jurisdiction or power to include lands which are already under irrigation or have such appurtenant water rights, for, of course, the granting of the discretionary power in one case and withholding it in the other was due, not to accident, but intention.

That construction is to be favored, too, because it is manifest that it was the intention of the lawmakers to protect the interests of the land owners in the case of lands which are already under irrigation.

Added force is also given to our contention by the fact that ordinarily the question whether lands are under irrigation or have water rights appurtenant thereto is not a question about which there may be any substantial controversy.

If the fact is that such lands are not already under irrigation they may be included. If upon the other hand the fact is that such lands are already under irrigation (and that fact is admitted here) the Court has no jurisdiction to include them; if it does so its act is void. The land owner is not called upon to object to such inclusion and the act of the Court in so including them is subject at any time to collateral attack.

Many cases which involve similar questions have been before the courts. The answer which has been given such questions has always depended upon the language of the statute by which the decision of the case was governed. To illustrate: In the case of

Oregon Short Line vs. Pioneer Irrigation District, 102 Pac. 904,

the language of the statute to be construed was as follows:

> "Nor shall any lands which would NOT IN THE JUDGMENT OF SAID BOARD be benefited by irrigation by the said system be included within such district."

Under such a statute it was held that an order by which certain lands were included in such district could not be collaterally attacked for the reason that the question whether or not they would be benefited by irrigation was a matter within the jurisdiction of the board which passed upon the matter.

The following cases involve the identical question that is involved in this case:

Andrews vs. Lilian Irrigation District, 97 N. W. 336.

State vs. Several Parcels of Land, 114 N. W. 283.

Horn vs. Shaffer, 151 Pac. 555.

City vs. Fresno Irrigation District, 237 Pac. 772.

It was urged in each one of those cases as it is here that the court or board which passed upon the matter had jurisdiction to include certain lands within an irrigation district and upon the other side it was contended that the court or board which passed upon the matter did not have such jurisdiction, and in each of said cases contention

was made for and against the proposition that the land owner in order to protect his rights was required to appear before the court or board which passed upon the matter and to have made objection there to such inclusion of his lands. In most of those cases the statute to be construed was substantially the same as the one which we are now considering. The decision of the Court in each case was that such court or board did not have jurisdiction to include the lands in question in an irrigation district and in consequence that the order so including such lands was void and might be attacked collaterally.

In the case of Andrews vs. Lilian Irrigation District, *supra,* the statute of Nebraska under consideration contains two provisions, which were both considered. One of the said provisions is to effect that no land shall be included in an irrigation district that will not in the OPINION OF THE BOARD be benefited by irrigation. The said statute contains another provision which is to the effect that in no case shall land which from some natural cause cannot be irrigated be included in such irrigation district or taxed for irrigation purposes. Andrews brought his suit against the irrigation district for the purpose of having declared the previous levy of taxes by the irrigation district upon his lands to be a cloud and to cancel them and that his lands be declared to be no part of the said district.

The lower court sustained a demurrer to the petition and the Supreme Court on Appeal first

affirmed the decision of the lower court upon the ground that its allegations brought the case within the first of said provisions and that the determination of that question was within the jurisdiction of the Board of County Commissioners. Upon a petition for a rehearing being filed that decision was reconsidered and it was held that the petition brought the case within the second of said provisions and that in such a case the board did not have any jurisdiction to include such lands. From the opinion of the Court on rehearing we quote the following:

> "Section 49 of said chapter provides that in no case shall land which from some natural cause cannot be irrigated be held in any irrigation district, or taxed for irrigation purposes. Thus it will be seen that the act under consideration clearly distinguishes between land which would not be benefited by irrigation, and such as from some natural cause is nonirrigable. As already shown whether a particular tract of land will be benefited by a proposed system of irrigation is a question which the legislature has confided to the county board. Whether a particular tract of land from some natural cause cannot be irrigated is a question which goes to the jurisdiction of the county board over such tract, and may be raised at any time in a proper case, because section 49, *supra,* expressly denies the jurisdiction of the county board to include such land in an irrigation

> district, or to tax it for irrigation purposes. Should such land be included within the boundaries of an irrigation district, or taxed for irrigation purposes, it would be in violation of a plain provision of the statute."

In the case of State vs. Several Parcels of Land, *supra,* a statute was under consideration which contains the following:

> "That where ditches or canals have been constructed before the passage of this act of sufficient capacity to water the land thereunder for which the water taken in such ditches is appropriated, such ditches and franchises and the land subject to be watered thereby shall be exempt from the operation of this law."

The suit was one brought by the state to enforce the payment of taxes levied by an irrigation district upon certain pieces of land which had been included within such irrigation district. The defense to the suit was that such lands could not be included in the irrigation district, for the Board of County Commissioners had no jurisdiction to include such land for the reason that ditches had been constructed sufficient to water such land, water for that purpose had been appropriated and in consequence thereof the board had no jurisdiction to include such lands in the district and that its order in attempting to do so was void. The Court adopted that contention and held that the order including such lands within the district was in ex-

cess of the jurisdiction of the Board of County Commissioners and was therefore void, the Court saying:

> "It is, however, contended that the county board had jurisdiction, and that its determination cannot be attacked in this proceeding. It must be conceded that, as to those matters which were by the statute committed to the consideration, investigation and determination of the county board, its judgment should not be collaterally attacked; but the question here is: Was it left to the county board to decide whether this land was under a ditch constructed prior to that time and of sufficient capacity to water the same * * * As already shown whether a particular tract of land will be benefited by a proposed system of irrigation is a question which the legislature has confided to the county board. Whether a particular tract of land, from some natural cause, cannot be irrigated, is a question which goes to the jurisdiction of the county board over such tract, and may be raised at any time in a proper case, because section 49, *supra,* expressly denies the jurisdiction of the county board to include such land in an irrigation district or to tax it for irrigation purposes."

The case of Horn vs. Shaffer, *supra,* was a suit brought against the county treasurer of Uinta County, Utah, to enjoin him from collecting a special tax assessed by the New Hope Irrigation District. The Utah statute under consideration con-

tained a clause similar to the Nebraska statute which was considered in the case last above referred to and is as follows:

> "Provided, that where ditches, canals, or reservoirs have been constructed before the passage of this act, such ditches, canals, reservoirs, and franchises, and the lands watered thereby, shall be exempt from the operation of this law, except such district shall be formed to purchase, acquire, lease or rent such ditches, canals, reservoirs and their franchises."

The plaintiff in his complaint in the action alleged:

> "That the pretended assessment against the plaintiff and his said lands of the said purported tax item given as 'N. Hope,' as above described, was not and could not be legally made for the reason that at the time of the pretended organization of said New Hope Irrigation District, and for many years immediately prior thereto, to wit, ever since the year 1906, the plaintiff as co-owner with others, had constructed a ditch, and had conveyed through said ditch water to his said lands as hereinbefore described, and had used said water on the said lands for irrigation and other beneficial purposes."

The allegations of the complainant also were to the effect that the tax in question was illegal because the officers of the district had no power or authority to levy taxes on the plaintiff's land.

In the trial court upon the trial the plaintiff offered proof of the allegations of his complaint which proof was rejected and the court sustained a motion for a nonsuit. The Supreme Court in reversing the decision of the lower court said:

> "A mere cursory examination of those parts of the pleadings we have set forth also shows that both the plaintiff and the defendant regarded the question of whether plaintiff's land was exempt under the proviso a question of fact. The plaintiff alleged that it was exempt because of the facts stated, and the defendant denied the allegations in that regard. There can be no doubt that the question is at least one of mixed law and fact, and hence the Court should have found the facts and made conclusion of law thereon, and should have entered judgment accordingly. Instead of that the Court determined the whole matter upon a motion for a nonsuit. This constituted reversable error."

In the case of City vs. Fresno Irrigation District, *supra,* the so-called Wright Law, which it is said is the model which was followed in framing the Montana Irrigation District statute, was under consideration. The city of Fresno sued the Fresno Irrigation District to enjoin the collection by the collector of the said irrigation district of certain taxes levied by the district on lands owned by the city upon the ground that the land in question was devoted to a public use and therefore was not subject to taxation by the irrigation district. A de-

murrer to the complaint was overruled and judgment rendered in the case for the plaintiff from which the defendant appealed to the Court of Appeals, which held that in California lands which were actually devoted to a public use were exempted from taxation of the character in question. It was contended, however, that whether the land in question was actually devoted to a public use was question of fact, that the city had an opportunity to present the question of the propriety of including its land in the irrigation district, that it failed to avail itself of that privilege and that the question was, therefore, one which could not be afterward raised, since the irrigation district had jurisdiction to determine the question of fact as to whether the land in question was actually devoted to a public use. In passing upon this contention the Court said:

> "The appellants urge that there is no showing in the complaint that the city attempted to have its lands excluded from the district or that, after the assessment was levied, it appeared before the board of directors of the district sitting as a board of equalization or objected to the assessment. The property being exempt from assessment, it was not necessary that the city, in order to avoid assessment, should have taken either of these steps."

The lands of Tomich being admitted to have been on June 26, 1919, already under irrigation and to have water rights appurtenant thereto, the irrigation district had no power or authority to include

such lands in the district and its act in so doing was a void act and might be at any time collaterally attacked.

II.

THE MONTANA IRRIGATION DISTRICT ACT IS VIOLATIVE OF ARTICLE III, SECTION 2, AND ARTICLE VI, PARAGRAPH SECOND OF THE FEDERAL CONSTITUTION, AND IS IN CONFLICT WITH SECTIONS 24 AND 28 OF THE JUDICIAL CODE.

The point which we are now making assumes that if the law were a valid law that the irrigation district had jurisdiction to determine the question whether the land of Tomich should be included in the district. If our first point should be determined favorably to our contention it will be unnecessary to consider our second and third points, for if the first point is determined in our favor it will be necessary to decide that the decree of the lower court should be reversed.

As we have already seen there was an attempted proceeding by the Montana Fifteenth Judicial District Court for the purpose of confirming and validating the proceedings by which the said so-called district were attempted to be organized and under which there had been an attempt to issue bonds of the district amounting to $75,000. The provisions of the statute

Section 7211, R. C. M. 1921,

are that the Board of Commissioners of the irrigation district MUST within ten days after the adop-

tion of a resolution for the issuance of bonds file in the STATE District Court of the Judicial District wherein is located the offices of said board a petition to determine the validity of the proceedings relating to the formation of such district and the issuance of such bonds, and an appeal may be taken to the Montana Supreme Court, and if such appeal shall not be taken or if taken and the judgment of the District Court is affirmed the said judgment of the District Court SHALL BE A FINAL JUDGMENT AND THE SAME SHALL NEVER BE CALLED IN QUESTION IN ANY COURT.

The question of the validity of the bonds, as has already been shown, involved the question whether the proceedings which resulted in the attempted organization of the district and the issuance of the bonds was due process of law. It appears that they were not due process of law for the reason that notice required by the statute was not given.

Pennoyer vs. Neff, 95 U. S. 773; 24 L. Ed. 565.

Scott vs. McNeal, 154 U. S. 46; 38 L. Ed. 896.

The value of the interests involved which were held by Tomich exceeded the sum of $3,000, exclusive of interest and costs and the question of the validity of the organization of the district and therefore the question of the validity of the proceedings by which the bonds were undertaken to be issued was a question of which under the Constitution and Laws of the United States the United States District Courts are given jurisdiction. The Montana statute prohibits a suit by Tomich in the

United States courts for the purpose of determining the validity of the bonds, for the provisions of the statute require that such suit be brought by the commissioners and in the state court, and the determination of the state court if there is no appeal or if there is an appeal but the determination by the Supreme Court is an affirmance, the judgment is given a conclusive and binding effect and there is a prohibition against afterward raising the question in any other court.

An independent suit by Tomich in the United States court to enjoin the issuance of the bonds would have been a futile proceeding. By the terms of the statute the petition by the commissioners must be filed, and as there was no notice of the character of the works proposed to be constructed it was not possible that Tomich should be able to anticipate the steps which might be taken by the district commissioners so as to enable him to start a suit in the federal court before such petition (which ordinarily is filed immediately upon the passage of the resolution for the issuance of the bonds) is filed in the state court, and the jurisdiction of the state court having first attached, the state court would not have stayed such proceeding nor would it have stayed such proceedings if a suit by Tomich in the United States court had been first filed; for under the state statute the filing of the petition and the prosecution of the proceeding is made not a privilege but a duty, and the duty may not be excused by the pending of some other suit.

The proceedings brought in the state court could not be removed into the federal court because (except certain exceptional cases within which this case cannot be included) cases which may be removed into the federal court are only such as may be brought there.

If the Montana irrigation district act is a valid law the federal statute defines the jurisdiction of the United States District Courts, and which provides for the right of removal of cases from the state courts to the said United States District Courts, cannot be given effect. The two laws are contradictory of each other and consequently the state law is invalid because the federal statute was enacted in pursuance of the provisions of the federal Constitution.

At least the said section 7211 must be held to be invalid, and if the so-called confirmation proceedings are invalid, there is no bar to a consideration of the question of the validity of the said bonds and the said proceedings.

III.

THE MONTANA IRRIGATION DISTRICT ACT IS VIOLATIVE OF THE DUE PROCESS OF LAW CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION IN THAT IT PERMITS THE ISSUANCE OF BONDS AND WARRANTS WHICH WILL REQUIRE FOR THEIR DISCHARGE THE LEVY OF TAXES BY THE IRRIGATION DISTRICT IN EXCESS OF BENEFITS WHICH MAY POS-

SIBLY BE DERIVED FROM MONEY REALIZED FROM SUCH BONDS AND WARRANTS, BUT IF THE STATUTE DOES NOT PERMIT SUCH ISSUANCE OF BONDS AND WARRANTS THEY WERE NEVERTHELESS SO ISSUED IN THIS CASE, AND ARE INVALID, BECAUSE IF NOT PERMITTED BY THE STATUTE THEY WERE NOT AUTHORIZED BY LAW.

It is admitted that the land of Tomich was under irrigation at the date of the petition for the so-called irrigation district; that such land was then of the reasonable value of $75.00 an acre; that the value of such land could not be possibly increased beyond $25.00 an acre by the successful completion and operation of the proposed irrigation works; that the indebtedness of the said district contracted in an attempt to provide such works and which is represented by said bonds and warrants exceeds $120,000 or more than $75 an acre for every acre of land within the district and which if the law is valid is a lien upon such land to the amount of such indebtedness; that the attempt of the district to construct or maintain irrigation works has been wholly unsuccessful; that there has been no water furnished for the lands in the irrigation district since the year 1919; that in consequence the land since 1919 has grown up in weeds; that buildings, fences and all other improvements have fallen into decay and that the indebtedness contracted by the

said so-called district is such that if valid the value of the Tomich land has been totally destroyed.

It is a well-settled rule of law that taxes for special improvements cannot be levied in excess of the improvements which are thereby created or which may possibly be thereby created. If it is possible to increase the value of land by a special improvement to the extent of $25.00 an acre, taxes amounting to $75.00 an acre cannot be levied for that purpose, because if they were then the property of the land owners to the extent of $50.00 an acre would have been taken without due process of law.

The indebtedness of $120,000 for the district means, of course, that the total of taxes required to be levied must equal that amount in order that the indebtedness may be discharged and the bonds and warrants must be held invalid if confiscatory taxation is necessary to pay them, unless, of course, they are in the hands of innocent purchasers, for value and without notice. In this case the prohibition against such unlawful taxation reaches the owners of the bonds and warrants because it is admitted that they knew that the improvements proposed exceeded in cost the possible benefit which could accrue at least to the extent of $50.00 an acre.

The question which is here presented was suggested in the case of

Andrews vs. Lilian Irrigation District, 92 N. W. 612,

referred to above. That case like the present case was a suit to declare taxes levied by an irrigation district upon the lands of the plaintiff a cloud upon

his title. In that case the complaint alleged that the lands of the appellant could not be benefited by irrigation but that the said lands were lands which would be injured by the distribution of water upon them by the irrigation system of ditches. In the original decision it was held that the remedy of the plaintiff was an application to the defendant to have these lands excluded. The Court went on to consider the question which would be presented if such an application should be denied and in passing on this point the Court used the following language:

> "If the effort should be made and should fail, some highly interesting questions would arise as to the constitutional right or legislative power of taxing private property for the construction and maintenance of public improvements by which it is not only not benefited, but is demonstrably injured."

The point here involved was passed upon in the case of

Dusch vs. Bronson, 248 Fed. 377,

a decision by the Circuit Court of Appeals for the Eighth Circuit, and a suit brought by a receiver of a railroad company to enjoin a sheriff from selling the railroad property for the purpose of collecting taxes levied for the construction of a highway. It was held that the power of taxation arbitrarily exercised for special improvements without compensation equal to the amount of taxes therefor amounts to confiscation and violates the due process

of law provision of the Fourteenth Amendment to the Constitution.

In

Lyon vs. Tonowanda, 98 Fed. 364,

it was held that the case of

Norwood vs. Baker, 172 U. S. 270, 43 L. Ed. 44,

declared the following principle, to wit:

> "The exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation."

The rule of law here stated was declared in the following:

Myles Salt Co. vs. Board of Commissioners, 239 U. S. 478, 60 L. Ed. 392.
Cowley vs. Spokane, 99 Fed. 844.
Jefferson vs. Wells, 172 S. W. 329.
Foy vs. Springfield, 94 Fed. 409.
Scranton vs. Levers, 49 Atl. 980.
Scott vs. Toledo, 36 Fed. 396.
Raisch vs. Regents of University of California, 174 Pac. 942.
Excelsior Plating Co. vs. Green, 1 So. 873.

As the taxes necessary to discharge the said bonds and warrants will in fact amount to confiscation there is no power in the officers named as defendants to collect them.

The only justification for the acts of the officers of the irrigation district in issuing the said bonds and warrants and levying taxes for their satisfaction is that their said acts were within the powers conferred by the said irrigation district statute. If the statute is valid it undoubtedly confers such power, but as the bonds and warrants are so large in amount as to require confiscatory taxation for their discharge, the statute must be held to be invalid upon the ground that it permits a violation of the constitutional provision. If it should be held, however, that the said acts were not permitted by the said statute, then such unauthorized acts are void and the said bonds and warrants are without validity for that reason.

The appellants respectfully submit that the decree appealed from should be reversed.

Respectfully submitted,

W. N. WAUGH,

JOHN A. SHELTON,

Solicitors for Appellant.

No. 5665

United States
Circuit Court of Appeals
For the Ninth Circuit.

Transcript of Record.

(IN TWO VOLUMES.)

SAMUEL H. ROBINSON and J. W. RANDOLPH,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

VOLUME I.

(Pages 1 to 480, Inclusive.)

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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District Court of the United States, Northern District of California, Southern Division.

Clerk's Office.

No. 19,217.

UNITED STATES OF AMERICA
vs.
SAMUEL H. ROBINSON, J. W. RANDOLPH et al.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of Said Court:

Sir: Please prepare transcript on appeal to include the following pleadings, papers, motions, proceedings and orders in the above-entitled cause:

1. Indictment.
2. Demurrers of the defendants Samuel H. Robinson and J. W. Randolph and orders thereon.
3. Petition for severance of Samuel H. Robinson and affidavit in support thereof and order thereon.

4. Motion of J. W. Randolph and Samuel H. Robinson for bill of particulars and order thereon.
5. Record of the trial.
6. Verdict of the jury.
7. Motions for new trial of defendants Samuel H. Robinson and J. W. Randolph and orders denying same.
8. Motions in arrest of judgments of Samuel H. Robinson and J. W. Randolph and orders denying same.
9. Sentences and judgment.
10. Notice of appeal.
11. Petition for appeal and supersedeas and order allowing same. [1*]
12. Assignment of errors.
13. Bill of exceptions.
14. Order settling and allowing bill of exceptions.
15. All stipulations and orders extending time to settle bill of exceptions and extending term.
16. This praecipe.
17. Citation on appeal.

HAROLD C. FAULKNER,
JAMES B. O'CONNOR and
H. H. HARRIS,
Attorneys for Defendant J. W. Randolph.
R. B. McMILLAN,
Attorney for Deft. Samuel H. Robinson.

[Endorsed]: Filed Nov. 15, 1928. [2]

*Page-number appearing at the foot of page of original certified Transcript of Record.

In the Southern Division of the United States District Court for the Northern District of California.

INDICTMENT.

At a stated term of said court begun and holden at the City and County of San Francisco within and for the Southern Division of the Northern District of California on the first Monday of November, in the year of our Lord one thousand nine hundred and twenty-seven,—

The Grand Jurors of the United States of America, within and for the Division and District aforesaid, on their oaths present: THAT

Prior to the date on which the several letters, writings and circulars herein referred to were mailed and caused to be delivered by mail, as hereinafter alleged in the several counts in this indictment, HARRY M. KASSMIR, CROMWELL SIMON, SAMUEL H. ROBINSON, ORTON E. GOODWIN and J. W. RANDOLPH, hereinafter called the defendants, had devised and intended to devise a scheme and artifice to defraud and for obtaining money and appropriate from the public in general, and in particular from a certain class of persons by means of certain false and fraudulent pretenses, representations and promises, that is to say, the persons (hereinafter called the "victims") could or might, by the means hereinafter described, be induced to send and pay their said money and to part with their said property to the said defend-

ants or to Cromwell Simon & Co., hereinafter referred to.

It was part of said scheme and artifice to defraud that the defendant Cromwell Simon should have issued to him by the Commissioner of Corporations of the State of California [3] a certificate authorizing him to offer for sale, negotiate for the sale of, and otherwise deal in securities in the State of California, and generally carry on the business of a broker in said state.

It was a further part of said scheme and artifice to defraud that defendants, Cromwell Simon and Harry M. Kassmir, as copartners, doing business under the firm name and style of Cromwell Simon & Co., should offer for sale and negotiate for the sale of and otherwise deal in securities in the State of California and generally carry on the business of brokerage in said state under the name of Cromwell Simon & Co.

It was a further part of said scheme and artifice to defraud that the defendants, Cromwell Simon and Harry M. Kassmir, should open brokerage offices in San Francisco, California, and that said Cromwell Simon and Harry M. Kassmir should be the proprietors of said brokerage office and the other defendants should be office managers and stock salesmen and agents of the said Cromwell Simon & Co.

It was a further part of said scheme and artifice to defraud that defendant Samuel H. Robinson should mail at San Francisco to Le Roy F. Pike at Reno, Nevada, articles of incorporation for a

new company to be called "Cromwell & Company, Inc.," at Reno, Nevada; that said defendant Robinson requested said Pike to obtain dummy directors and should regularly incorporate Cromwell & Company, Inc., under the laws of the State of Nevada.

It was a further part of the said scheme and artifice to defraud that the defendants, Samuel H. Robinson, Harry M. Kassmir and Cromwell Simon should visit Reno, Nevada, for [4] the purpose of attending a meeting of the directors of Cromwell & Company, Inc.

It was a further part of the said scheme and artifice to defraud that at the meeting of the Board of Directors of said company, defendant Kassmir should offer to subscribe $50,000 worth of this company's stock and pay cash for it, and that said offer was put in the form of a resolution, seconded, voted and passed unanimously;

WHEREAS, in truth and in fact, as defendant then and there well knew, defendant Kassmir did not pay $50,000 cash for said stock or anything at all.

It was a further part of the said scheme and artifice to defraud that the defendants should solicit and procure from said victims subscriptions and orders for shares of high-grade corporate stock and other securities, on the "Cromwell Simon and Co. Investment Plan," by false and fraudulent representations and promises as to the financial standing of the Cromwell Simon and Company and of the defendants Cromwell Simon and Harry M. Kassmir; by false and fraudulent representations

and promises as to the care and watchfulness exercised for the benefit of said victims by the said defendants over investments made with them by said victims, and generally by false and fraudulent representations and promises as to the alleged safety of purchasing high-grade stocks and other high-grade securities, through the said defendants and the said Cromwell Simon Company.

It was a further part of said scheme and artifice to defraud that the said defendants should, whenever possible, require the victims to deliver over to said defendants valuable securities as alleged collateral to secure deferred payments on stock subscribed for, and that the said defendants [5] should take and embezzle and convert such collateral securities to their own use and benefit without accounting to said victims therefor, and thus could and would defraud the said victims out of their money and property.

It was a further part of said scheme and artifice to defraud that defendants should induce and persuade the victims to purchase high-grade stock and other securities under the Cromwell & Simon Co. Investment Plan by means of certain false representations which the defendants did not then and there or ever intend to carry out or perform, made and communicated to the victims by means of letters, circulars and advertisements sent through the mail and statements made orally by defendants and by their agents.

It was a further part of the said scheme and artifice to defraud that the defendants in order to

induce their victims to part with their money and property should raise in said victims hopes and expectations of profit and reward far beyond the limits warranted by existing conditions by means of alluring, exaggerated, misleading, false and fraudulent representations, pretenses and promises, which representations, pretenses and promises are substantially and in effect as follows:

(1) That Cromwell Simon & Co. was a reputable brokerage company and the victims could rely upon the standing and financial responsibility of Cromwell Simon & Co.;

WHEREAS, in truth and in fact, as the defendants then and there well knew, the said company was not a responsible brokerage house, but of the character of a "bucket" shop and without business standing or financial resources sufficient to carry on a reliable brokerage business. [6]

(2) That the business of Cromwell Simon & Co. was to sell to victims high-grade corporate stock and other securities, particularly on the partial payment plan;

WHEREAS, in truth and in fact, as the defendants then and there well knew, Cromwell Simon & Co. did not sell to the victims high-grade corporate stock and other securities, or any stock or securities at all.

(3) That the defendants would obtain subscriptions from the victims for such stocks and other securities on the Cromwell Simon & Co. Investment Plan, and would immediately purchase the same at market price for and on account of the said victim

and that Cromwell Simon & Co. would hold the same so that the victim could be certain that the high-grade stocks and other securities would be on hand for them at any and all times when called for by them;

WHEREAS, in truth and in fact, as the defendants then and there well knew, Cromwell Simon & Co. did not immediately purchase such high-grade stocks and other securities at the market price for the account of the victims at the time said victims gave said company subscription for stock, or at all, and that the said company would not, and did not hold the same so that the victims could be certain that the stocks and securities would be on hand when called for.

(4) That interest would be charged on deferred payments due from victims on such high-grade stocks and other securities at the rate of 6 per cent per annum, in addition to service charge, and that the victim would draw, in the meantime, any dividends or interest declared or payable on the high-grade stock and other securities so purchased and held by them; [7]

WHEREAS, in truth and in fact, as the said defendants then and there well knew, Cromwell Simon & Co. did not and could not pay to the victims any dividends or interest declared or payable on such high-grade stocks or securities.

(5) That Cromwell Simon & Co. were particularly well qualified to advise victims when to buy and sell corporate stocks and other securities; that an investor subscribing for such corporate stock, or

other security, through the said company, would have the privilege of selling the same at any time he desired, and that the said defendants could be depended upon to give advice along such lines and would notify the victims when to sell to the best advantage;

WHEREAS, in truth and in fact, as the defendants then and there well knew, the said company was not well qualified to advise the victims when to buy and sell corporate stocks and other securities; that the said victims could not rely upon said defendants for safe information or advice in the matter of buying or selling corporate stocks or other securities, but that the said defendants would only endeavor to procure from the victims the largest possible amounts of money and property, which money and property the said defendants would appropriate and embezzle to their own use and benefit.

And the Grand Jurors aforesaid, on their oaths aforesaid, present: THAT

Each and all of the aforesaid representations and promises made and planned to be made by defendants, as aforesaid, were false and untrue, and that the defendants when so devising said scheme and artifice to defraud, and [8] at the time of committing the several offenses, and each of the said several offenses, hereinafter in this indictment set forth, and at all times referred to in this indictment, well knew the same to be false and untrue, and the same were all and each made by the defend-

ants for the purpose of executing said scheme and artifice to defraud.

It was a further part of said scheme and artifice to defraud that the said defendants should, on or about April 8, 1925, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, unlawfully, wilfully, knowingly and feloniously place and cause to be placed in the United States postoffice at San Francisco, California, to be sent and delivered by the Postoffice Establishment of the United States, a certain postpaid envelope addressed to Mr. G. A. Johnson, Chualar, California, which said envelope then and there contained and had enclosed therein the following letter:

"CROMWELL SIMON & COMPANY,
Mills Building,
220 Montgomery Street,
San Francisco.

High Grade Investment Securities
All Standard Oil Stocks
Unlisted Stocks
Bonds

Telephone
Kearny 6940

April
8th
1925.

Mr. G. A. Johnson,
Chualar, Calif.

Dear Mr. Johnson:

We are enclosing you our special report on the Di Giorgio Corporation, at your request.

We are frank to assure you that the present market price of your stock is low in comparison to the price you paid for it. Yet, the company's general condition is improving so rapidly, as is indicated by our report, that we believe if you hold on to this security, you will come out in the end in quite a satisfactory fashion. [9]

We would suggest that in future, however, you confine your purchases to listed stocks such as Standard Oil of California, which not only has a ready immediate market, but always pays dividends and increases steadily in value.

You will see from the report that had you invested $100 in Standard Oil of California some twelve years ago, your investment today would be worth around $1008 and you would have received $272 dividends.

To enable you to acquire such worth while holdings as Standard Oil of California, we should be glad to make you a loan on your Di Giorgia holdings, or to use them as collateral on the purchase of a block of Standard Oil of California. Thus, you will be able to receive the dividends from both the Di Giorgio and the Standard Oil of California and should find such a purchase a very profitable one.

If we can do anything for you, please call upon us.

Very truly yours,
CROMWELL SIMON & COMPANY.
(Signed) ORTON E. GOODWIN.

OEG/H. [10]

COUNT TWO.

And the Grand Jurors on their oaths aforesaid do further present: THAT HARRY M. KASSMIR, CROMWELL SIMON, SAMUEL H. ROBINSON, ORTON E. GOODWIN and J. W. RANDOLPH, the identical parties named in the first count of this indictment, hereinafter called the defendants, so having devised the aforesaid scheme and artifice to defraud and for obtaining money and property under the false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are hereby incorporated by reference thereto in this count as fully and with like effect for all purposes as though the same were here reiterated and repeated, for the purpose of executing said scheme and artifice to defraud, did, on or about April 22, 1925, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, unlawfully, wilfully, knowingly and feloniously place and cause to be placed in the United States postoffice at San Francisco, California, to be sent and delivered by the Postoffice Establishment of the United States, a certain postpaid envelope addressed to Mr. Gustave A. Johnson, P. O. Box 53, Chaular, California, which said envelope then and there contained and had enclosed therein the following:

(a) A certain letter in words and figures shown by the photostatic copy thereof attached hereto and marked Exhibit "A," and by

this reference incorporated herein and made a part hereof with like effect and for all purposes as though set forth in full herein. [11]

(b) A certain document entitled "Cromwell Simon & Company, Certificate," the face thereof being in the words and figures as shown by the photostatic copy thereof attached hereto and marked Exhibit "B" and by this reference incorporated herein and made a part hereof with like effect for all purposes as though set forth in full herein; and the back thereof being in the words and figures as shown by the photostatic copy thereof attached hereto and marked Exhibit "C" and by this reference incorporated herein and made a part hereof with like effect for all purposes as though set forth in full herein.

(c) A certain document entitled "The Cromwell Simon & Company Plan" of the following tenor, to wit, the face thereof being in the words and figures as shown by the photostatic copy thereof attached hereto and marked Exhibit "D" and by this reference incorporated herein and made a part hereof with like effect for all purposes as though set forth in full herein; and the back thereof being in the words and figures as shown by the photostatic copy thereof attached hereto and marked Exhibit "E" and by this reference incorpo-

rated herein and made a part hereof with like effect for all purposes as though set forth in full herein.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

COUNT THREE.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present as follows: THAT HARRY M. KASSMIR, CROMWELL SIMON, SAMUEL H. ROBINSON, ORTON E. GOODWIN and J. W. RANDOLPH, the identical parties named in the first count of this indictment, hereinafter called the defendants, so having devised the aforesaid scheme and artifice to defraud and for obtaining money and property under the false and fraudulent pretenses, representations and promises described in [12] the first count of this indictment, the allegations concerning which in said first count are hereby incorporated by reference thereto in this count as fully and with like effect for all purposes as though the same were here reiterated and repeated, for the purpose of executing said scheme and artifice to defraud, did, on or about July 7, 1925, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, unlawfully, wilfully, knowingly and feloniously place and cause to be placed in the United States postoffice at San Francisco, California, to be sent and delivered by

the Postoffice Establishment of the United States, a certain postpaid envelope addressed to Mr. G. A. Johnson, P. O. Box 53, Chaular, Calif., which said envelope then and there contained and had enclosed therein a certain letter in words and figures shown by the photostatic copy thereof attached hereto and marked Exhibit "F," and by this reference incorporated herein and made a part hereof with like effect and for all purposes as though set forth in full herein.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

COUNT FOUR.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present as follows: THAT HARRY M. KASSMIR, CROMWELL SIMON, SAMUEL H. ROBINSON, ORTON E. GOODWIN and J. W. RANDOLPH, the identical parties named in the first count of this [13] indictment, hereinafter called the defendants, so having devised the aforesaid scheme and artifice to defraud and for obtaining money and property under the false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are hereby incorporated by reference thereto in this count as fully and with like effect for all purposes as though the same were here reiterated and repeated, for the purpose of executing said

scheme and artifice to defraud, did, on or about July 13, 1925, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, unlawfully, wilfully, knowingly and feloniously place and cause to be placed in the United States postoffice at San Francisco, California, to be sent and delivered by the Postoffice Establishment of the United States, a certain postpaid envelope addressed to Gustave A. Johnson, P. O. Box 53, Chualar, Calif., which said envelope then and there contained and had enclosed therein a card in words and figures shown by the photostatic copy thereof attached hereto and marked Exhibit "G" and by this reference incorporated herein and made a part hereof with like effect and for all purposes as though set forth in full herein.

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided. [14]

COUNT FIVE.

And the Grand Jurors on their oaths aforesaid do further present: THAT HARRY M. KASSMIR, CROMWELL SIMON, SAMUEL M. KASSMIR, ORTON E. GOODWIN and J. W. RANDOLPH, the identical parties named in the first count of this indictment, hereinafter called the defendants, so having devised the aforesaid scheme and artifice to defraud and for obtaining money and property under the false and fraudulent pretenses, represen-

tations and promises described in the first count of this indictment, the allegations concerning which in said first count are hereby incorporated by reference thereto in this count as fully and with like effect for all purposes as though the same were here reiterated and repeated, for the purpose of executing said scheme and artifice to defraud, did, on or about October 29, 1925, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, unlawfully, wilfully, knowingly and feloniously place and cause to be placed in the United States postoffice at San Francisco, California, to be sent and delivered by the Postoffice Establishment of the United States a certain postpaid envelope addressed to Mr. Gustave A. Johnson, P. O. Box 53, Chualar, California, which said envelope then and there contained and had enclosed therein the following:

(a) A certain letter in words and figures shown by the photostatic copy thereof attached hereto and marked "H," and by this reference incorporated herein and made a part hereof with like effect and for all purposes as though set forth [15] in full herein.

(b) A certain document entitled "PAYMENT NOTICE" of the following tenor, to wit, being in the words and figures as shown by the photostatic copy thereof attached hereto and marked Exhibit "I" and by this reference incorporated herein and made a part hereof with like effect for all purposes as though set forth in full herein.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

COUNT SIX.

And the Grand Jurors on their oaths aforesaid, do further present: THAT HARRY M. KASSMIR, CROMWELL SIMON, SAMUEL H. ROBINSON, ORTON E. GOODWIN and J. W. RANDOLPH, the identical parties named in the first count of this indictment, hereinafter called the defendants, so having devised the aforesaid scheme and artifice to defraud and for obtaining money and property under the false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are hereby incorporated by reference thereto in this count as fully and with like effect for all purposes as though the same were here reiterated and repeated, for the purpose of executing said scheme and artifice to defraud, did, on or about May 13, 1926, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, unlawfully, wilfully, knowingly and [16] feloniously place and cause to be placed in the United States postoffice at San Francisco, California, to be sent and delivered by the Postoffice Establishment of the United States, a certain envelope addressed to Mr. J. A. Bardin, Attorney-at-law, Salinas, California, which said envelope then and

there contained and had enclosed therein a letter addressed to Mr. J. A. Bardin, Attorney-at-law, Salinas, California, in words and figures shown by the photostatic copy thereof attached hereto and marked Exhibit "J" and by this reference incorporated herein and made a part hereof with like effect and for all purposes as though set forth in full herein.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

COUNT SEVEN.

And the Grand Jurors on their oaths aforesaid, do further present: THAT HARRY M. KASSMIR, CROMWELL SIMON, SAMUEL H. ROBINSON, ORTON E. GOODWIN and J. W. RANDOLPH, the identical parties named in the first count of this indictment, hereinafter called the defendants, so having devised the aforesaid scheme and artifice to defraud and for obtaining money and property under the false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are hereby incorporated by reference thereto in this count as fully [17] and with like effect for all purposes as though the same were here reiterated and repeated, for the purpose of executing said scheme and artifice to defraud, did, on or about June 24, 1925, in the Southern Division of the Northern Dis-

trict of California, and within the jurisdiction of this court, unlawfully, wilfully, knowingly and feloniously place and cause to be placed in the United States postoffice at San Francisco, California, to be sent and delivered by the Postoffice Establishment of the United States, a certain postpaid envelope addressed to Mr. S. Tiger, 1826 Anza St., San Francisco, Calif., which said envelope then and there contained and had enclosed therein the following:

(a) A certain letter in words and figures shown by the photostatic copy thereof attached hereto and marked Exhibit "K," and by this reference incorporated herein and made a part hereof with like effect and for all purposes as though set forth in full herein.

(b) A certain document entitled "Special Report on Dodge Brothers, Inc.," the first page thereof being in the words and figures as shown by the photostatic copy thereof attached hereto and marked Exhibit "L" and by this reference incorporated herein and made a part hereof with like effect for all purposes as though set forth in full herein; and the second page thereof being in the words and figures as shown by the photostatic copy thereof attached hereto and marked Exhibit "M" and by this reference incorporated herein and made a part hereof with like effect for all purposes as though set forth in full herein.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided. [18]

COUNT EIGHT.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: THAT HARRY M. KASSMIR, CROMWELL SIMON, SAMUEL H. ROBINSON, ORTON E. GOODWIN, and J. W. RANDOLPH, the identical parties named in the first count of this indictment hereinafter called the defendants, so having devised the aforesaid scheme and artifice to defraud and for obtaining money and property under the false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are hereby incorporated by reference thereto in this count as fully and with like effect for all purposes as though the same were here reiterated and repeated, for the purpose of executing said scheme and artifices to defraud, did, on or about June 30, 1925, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, unlawfully, wilfully, knowingly and feloniously place and cause to be placed in the United States postoffice at San Francisco, California, to be sent and delivered by the Postoffice Establishment of the United States a certain postpaid envelope addressed to Mrs. Annie G. Tiger, 1828 Anza Street, San Francisco, which said envelope then and there

contained and had enclosed therein a letter in words and figures shown by the photostatic copy thereof attached hereto and marked Exhibit "N," and by this reference incorporated herein and made a part hereof with like effect and for all purposes as though set forth in full herein. [19]

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

COUNT NINE.

And the Grand Jurors on their oaths aforesaid do further present: THAT HARRY M. KASSMIR, CROMWELL SIMON, SAMUEL H. ROBINSON, ORTON E. GOODWIN and J. W. RANDOLPH, the identical parties named in the first count of this indictment, hereinafter called the defendants, so having devised the aforesaid scheme and artifice to defraud and for obtaining money and property under the false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are hereby incorporated by reference thereto in this count as fully and with like effect for all purposes as though the same were here reiterated and repeated, for the purpose of executing said scheme and artifice to defraud, did, on or about July 2d, 1926, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, unlawfully, wilfully, knowingly and feloniously

place and cause to be placed in the United States postoffice at San Francisco, California, to be sent and delivered by the Postoffice Establishment of the United States, a certain postpaid envelope addressed to Mrs. Annie G. Tiger, 1828 Anza Street, San Francisco, which said envelope then and there contained and had enclosed a certain letter in words and figures shown by the [20] photostatic copy thereof attached hereto and marked Exhibit "O," and by this reference incorporated herein and made a part hereof with like effect and for all purposes as though set forth in full herein.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

COUNT TEN.

And the Grand Jurors on their oaths aforesaid do further present: THAT HARRY M. KASSMIR, CROMWELL SIMON, SAMUEL H. ROBINSON, ORTON E. GOODWIN and J. W. RANDOLPH, the identical parties named in the first count of this indictment, hereinafter called the defendants, so having devised the aforesaid scheme and artifice to defraud and for obtaining money and property under the false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are hereby incorporated by reference thereto in this count as fully and with like effect for all purposes as though

the same were here reiterated and repeated, for the purpose of executing said scheme and artifice to defraud, did, on or about September 5, 1925, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, unlawfully, wilfully, knowingly and feloniously place and caused to be placed in the United States postoffice at San Francisco, California, to be [21] sent and delivered by the Postoffice Establishment of the United States, a certain postpaid envelope addressed to Mrs. Annie G. Tiger, 1828 Anza Street, San Francisco, Calif., which said envelope then and there contained and had enclosed therein the following:

(a) A certain letter in words and figures shown by the photostatic copy thereof attached hereto and marked Exhibit "P," and by this reference incorporated herein and made a part hereof with like effect and for all purposes as though set forth in full herein.

(b) A certain document entitled "Cromwell Simon & Company Certificate," the face thereof being in the words and figures as shown by the photostatic copy thereof attached hereto and marked Exhibit "Q," and by this reference incorporated herein and made a part hereof with like effect for all purposes as though set forth in full herein; and the back thereof being in the words and figures as shown by the photostatic copy thereof attached hereto and

marked Exhibit "R" and by this reference incorporated herein and made a part hereof with like effect and for all purposes as though set forth in full herein.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

COUNT ELEVEN.

And the Grand Jurors on their oaths aforesaid do further present: THAT HARRY M. KASSMIR, CROMWELL SIMON, SAMUEL H. ROBINSON, ORTON E. GOODWIN and J. W. RANDOLPH, the identical parties named in the first count of this indictment, hereinafter called the defendants, so having devised the aforesaid scheme and artifice to defraud and [22] for obtaining money and property under the false and fraudulent, pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are hereby incorporated by reference thereto in this count as fully and with like effect for all purposes as though the same were here reiterated and repeated, for the purpose of executing said scheme and artifice to defraud, did, on or about May 14, 1926, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, unlawfully, wilfully, knowingly and feloniously place and cause to be placed in the United States postoffice at San Francisco, California, to be sent and delivered by the

Postoffice Establishment of the United States, a certain postpaid envelope addressed to Mrs. Anna Tiger, 1828 Anza St., Apt. 3, San Francisco, California, which said envelope then and there contained and had enclosed therein a certain letter in words and figures shown by the photostatic copy thereof attached hereto and marked Exhibit "S," and by this reference incorporated herein and made a part hereof with like effect and for all purposes as though set forth in full herein.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

COUNT TWELVE.

And the Grand Jurors on their oaths aforesaid do further present: THAT HARRY M. KASSMIR, CROMWELL SIMON, SAMUEL H. ROBINSON, ORTON E. GOODWIN, and J. W. RANDOLPH, [23] the identical parties named in the first count of this indictment, hereinafter called the defendants, so having devised the aforesaid scheme and artifice to defraud and for obtaining money and property under the false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are hereby incorporated by reference thereto in this count as fully and with like effect for all purposes as though the same were here reiterated and repeated, for the purpose of executing said scheme and artifice to

defraud, did, on or about April 1, 1925, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, unlawfully, wilfully, knowingly and feloniously place and cause to be placed in the United States postoffice at San Francisco, California, to be sent and delivered by the Postoffice Establishment of the United States, a certain postpaid envelope addressed to Mr. Ernest C. Hipp, 543 Monroe, Santa Clara, Calif., which said envelope then and there contained and had enclosed therein the following:

(a) A certain letter in words and figures shown by the photostatic copy thereof attached hereto and marked Exhibit "T," and by this reference incorporated herein and made a part hereof with like effect and for all purposes as though set forth in full herein. [24]

(b) A certain document entitled "The Cromsell Simon & Company Plan" of the following tenor, to wit, the face thereof being in the words and figures as shown by the photostatic copy thereof attached hereto and marked Exhibit "U" and by this reference incorporated herein and made a part hereof with like effect for all purposes as though set forth in full herein; and the back thereof being in the words and figures as shown by the photostatic copy thereof attached hereto and marked Exhibit "V" and by this reference incorporated herein and made a part hereof

with like effect for all purposes as though set forth in full herein.

(c) A certain document entitled "Cromwell Simon & Company Certificate," the face thereof being in the words and figures as shown by the photostatic copy thereof attached hereto and marked Exhibit "W" and by this reference incorporated herein and made a part hereof with like effect for all purposes as though set forth in full herein; and the back thereof being in the words and figures as shown by the photostatic copy thereof attached hereto and marked Exhibit "X" and by this reference incorporated herein and made a part hereof with like effect for all purposes as though set forth in full herein.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

COUNT THIRTEEN.

And the Grand Jurors on their oaths aforesaid, do further present: THAT HARRY M. KASSMIR, CROMWELL SIMON, SAMUEL H. ROBINSON, ORTON E. GOODWIN and J. W. RANDOLPH, the identical parties named in the first count of this indictment, hereinafter called the defendants, so having devised the aforesaid scheme and artifice to defraud and for obtaining money and property under the false and fraudulent pretenses,

representations and promises described [25] in the first count of this indictment, the allegations concerning which in said first count are hereby incorporated by reference thereto in this count as fully and with like effect for all purposes as though the same were here reiterated and repeated, for the purpose of executing said scheme and artifice to defraud, did, on or about March 31, 1925, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, unlawfully, wilfully, knowingly and feloniously place and cause to be placed in the United States postoffice at San Francisco, California, to be sent and delivered by the Postoffice Establishment of the United States, a certain envelope addressed to Mr. Ernest Hipp, 543 Monroe St., Santa Clara, which said envelope then and there contained and had enclosed therein a certain receipt in words and figures shown by the photostatic copy thereof attached hereto and marked Exhibit "Y," and by this reference incorporated herein and made a part hereof with like effect and for all purposes as though set forth in full herein.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

COUNT FOURTEEN.

And the Grand Jurors on their oaths aforesaid, do further present: THAT HARRY M. KASSMIR, CROMWELL SIMON, SAMUEL H. ROB-

INSON, ORTON E. GOODWIN and J. W. RANDOLPH, [26] the identical parties named in the first count of this indictment, hereinafter called the defendants, so having devised the aforesaid scheme and artifice to defraud and for obtaining money and property under the false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are hereby incorporated by reference thereto in this count as fully and with like effect for all purposes as though the same were here reiterated and repeated, for the purpose of executing said scheme and artifice to defraud, did, on or about April 6, 1925, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, unlawfully, wilfully, knowingly and feloniously place and cause to be placed in the United States postoffice at San Francisco, California, to be sent and delivered by the Postoffice Establishment of the United States, a certain postpaid envelope addressed to Mr. Ernest Hipp, 543 *Monroe, Santa Clara,* Calif., which said envelope then and there contained and had enclosed therein a certain letter in words and figures shown by the photostatic copy thereof attached hereto and marked Exhibit "Z," and by this reference incorporated herein and made a part hereof with like effect and for all purposes as though set forth in full herein.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the

statute of the said United States of America in such case made and provided. [27]

COUNT FIFTEEN.

And the Grand Jurors on their oaths aforesaid do further present: THAT HARRY M. KASSMIR, CROMWELL SIMON, SAMUEL H. ROBINSON, ORTON E. GOODWIN and J. W. RANDOLPH, the identical parties named in the first count of this indictment, hereinafter called the defendants, so having devised the aforesaid scheme and artifice to defraud and for obtaining money and property under the false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are hereby incorporated by reference thereto in this count as fully and with like effect for all purposes as though the same were here reiterated and repeated, for the purpose of executing said scheme and artifice to defraud, did, on or about June 29, 1925, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, unlawfully, wilfully, knowingly and feloniously place and cause to be placed in the United States postoffice at San Francisco, California, to be sent and delivered by the Postoffice Establishment of the United States, a certain postpaid envelope addressed to Mr. Ernest Hipp, 543 Monroe St., Santa Clara, Calif., which said envelope then and there contained and had enclosed therein a certain letter in words and figures shown by the photostatic copy

thereof attached hereto and marked Exhibit "AA" and by this reference incorporated herein and made a part hereof with like effect and for all purposes as though set forth in full herein. [28]

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

COUNT SIXTEEN.

And the Grand Jurors on their oaths aforesaid do further present: THAT HARRY M. KASSMIR, CROMWELL SIMON, SAMUEL H. ROBINSON, ORTON E. GOODWIN and J. W. RANDOLPH, the identical parties named in the first count of this indictment, hereinafter called the defendants, so having devised the aforesaid scheme and artifice to defraud and for obtaining money and property under the false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are hereby incorporated by reference thereto in this count as fully and with like effect for all purposes as though the same were here reiterated and repeated, for the purpose of executing said scheme and artifice to defraud, did, on or about April 23, 1925, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, unlawfully, wilfully, knowingly and feloniously place and cause to be placed in the United States postoffice at San Francisco, California, to be sent and de-

livered by the Postoffice Establishment of the United States, a certain postpaid envelope addressed to Mrs. B. M. Ogier, 1696 Green Street, San Francisco, Cal., [29] which said envelope then and there contained and had enclosed therein a certain letter in words and figures shown by the photostatic copy thereof attached hereto and marked Exhibit "BB" and by this reference incorporated herein and made a part hereof with like effect and for all purposes as though set forth in full herein.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

COUNT SEVENTEEN.

And the Grand Jurors on their oaths aforesaid do further present: THAT HARRY M. KASSMIR, CROMWELL SIMON, SAMUEL H. ROBINSON, ORTON E. GOODWIN and J. W. RANDOLPH, the identical parties named in the first count of this indictment, hereinafter called the defendants, so having devised the aforesaid scheme and artifice to defraud and for obtaining money and property under the false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are hereby incorporated by reference thereto in this count as fully and with like effect for all purposes as though the same were here reiterated and repeated, for the purpose of executing said scheme and artifice to

defraud, did, on or about June 13, 1925, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, unlawfully, wilfully, knowingly and feloniously place and cause to be placed in the United [30] States postoffice at San Francisco, California, to be sent and delivered by the Postoffice Establishment of the United States, a certain postpaid envelope addressed to Mrs. B. M. Ogier, 1696 Green Street, San Francisco, Calif., which said envelope then and there contained and had enclosed therein a certain letter in words and figures shown by the photostatic copy thereof attached hereto and marked Exhibit "CC" and by this reference incorporated herein and made a part hereof with like effect and for all purposes as though set forth in full herein.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

COUNT EIGHTEEN.

And the Grand Jurors on their oaths aforesaid do further present: THAT HARRY M. KASSMIR, CROMWELL SIMON, SAMUEL H. ROBINSON, ORTON E. GOODWIN and J. W. RANDOLPH, the identical parties named in the first count of this indictment, hereinafter called the defendants, so having devised the aforesaid scheme and artifice to defraud and for obtaining money and property under the false and fraudulent pretenses, representations and promises described in

the first count of this indictment, the allegations concerning which in said first count are hereby incorporated by reference thereto in this count as fully and with like effect for all purposes as though the same were here reiterated and repeated, for the purpose of [31] executing said scheme and artifice to defraud, did, on or about October 9, 1925, unlawfully, wilfully and feloniously and knowingly cause to be delivered by the Postoffice Establishment of the United States, at San Francisco, California, in the Southern Division of the Northern District of California and within the jurisdiction of this court, according to the direction thereon, a certain letter enclosed in a postpaid envelope addressed to Miss Clara Oliver, 1696 Green St., San Francisco, California, which said letter in words and figures shown by the photostatic copy thereof attached hereto and marked Exhibit "DD" is by *by* this reference incorporated herein and made a part hereof with like effect and for all purposes as though set forth in full herein.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

COUNT NINETEEN.

And the Grand Jurors on their oaths aforesaid do further present: THAT HARRY M. KASSMIR, CROMWELL SIMON, SAMUEL H. ROBINSON, ORTON E. GOODWIN and J. W. RANDOLPH, the identical parties named in the first

count of this indictment, hereinafter called the defendants, so having devised the aforesaid scheme and artifice to defraud and for obtaining money and property under the false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are hereby incorporated by reference thereto in this count as fully [32] and with like effect for all purposes as though the same were here reiterated and repeated, for the purpose of executing said scheme and artifice to defraud, did, on or about October 29, 1925, unlawfully, wilfully, feloniously and knowingly cause to be delivered by the Postoffice Establishment of the United States, at San Francisco, California, in the Southern Division of the Northern District of California and within the jurisdiction of this court, according to the direction thereon, a certain letter enclosed in a postpaid envelope addressed to Miss Clara Oliver, 1696 Green Street, San Francisco, Calif., which said letter in words and figures shown by the photostatic copy thereof attached hereto and marked Exhibit "EE," is by this reference incorporated herein and made a part hereof with like effect and for all purposes as though set forth in full herein.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

COUNT TWENTY.

And the Grand Jurors on their oaths aforesaid

do further present: THAT HARRY M. KASSMIR, CROMWELL SIMON, SAMUEL H. ROBINSON, ORTON E. GOODWIN and J. W. RANDOLPH, the identical parties named in the first count of this indictment, hereinafter called the defendants, so having devised the aforesaid scheme and artifice to defraud and for obtaining money and property under the false and fraudulent pretenses, representations and promises described [33] in the first count of this indictment, the allegations concerning which in said first count are hereby incorporated by reference thereto in this count as fully and with like effect for all purposes as though the same were here reiterated and repeated, for the purpose of executing said scheme and artifice to defraud, did, on or about March 15, 1926, unlawfully, wilfully, feloniously and knowingly cause to be delivered by the Postoffice Establishment of the United States, at San Francisco, California, in the Southern Division of the Northern District of California and within the jurisdiction of this court, according to the direction thereon, a certain letter enclosed in a postpaid envelope addressed to Miss Clara Oliver, 1696 Green St., San Francisco, Calif., which said letter in words and figures shown by the photostatic copy thereof attached hereto and marked Exhibit "FF" is by this reference incorporated herein and made a part hereof with like effect and for all purposes as though set forth in full herein.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the

statute of the said United States of America in such case made and provided.

COUNT TWENTY-ONE.

And the Grand Jurors on their oaths aforesaid do further present: THAT HARRY M. KASSMIR, CROMWELL SIMON, SAMUEL H. ROBINSON, ORTON E. GOODWIN and J. W. RANDOLPH, the identical parties named in the first count of this [34] indictment, hereinafter called the defendants, so having devised the aforesaid scheme and artifice to defraud and for obtaining money and property under the false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are hereby incorporated by reference thereto in this count as fully and with like effect for all purposes as though the same were here reiterated and repeated, for the purpose of executing said scheme and artifice to defraud, did, on or about May 5, 1926, unlawfully, wilfully, feloniously and knowingly cause to be delivered by the Postoffice Establishment of the United States, at San Francisco, California, in the Southern Division of the Northern District of California and within the jurisdiction of this court, according to the direction thereon, a certain letter enclosed in a postpaid envelope addressed to Miss Clara Oliver, 1696 Green St., San Francisco, Cal., which said letter in words and figures shown by the photostatic copy thereof attached hereto and marked Exhibit "GG" is by this

reference incorporated herein and made a part hereof with like effect and for all purposes as though set forth in full herein.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided. [35]

COUNT TWENTY-TWO.

And the Grand Jurors on their oaths aforesaid do further present: THAT HARRY M. KASSMIR, CROMWELL SIMON, SAMUEL H. ROBINSON, ORTON E. GOODWIN and J. W. RANDOLPH, the identical parties named in the first count of this indictment, hereinafter called the defendants, so having devised the aforesaid scheme and artifice to defraud and for obtaining money and property under the false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are hereby incorporated by reference thereto in this count as fully and with like effect for all purposes as though the same were here reiterated and repeated, for the purpose of executing said scheme and artifice to defraud, did, on or about September 11, 1925, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, unlawfully, wilfully, knowingly and feloniously place and cause to be placed in the United States postoffice at San Francisco, California, to be sent and delivered by the Postoffice Establish-

ment of the United States, a certain postpaid envelope addressed to Mr. W. F. Allen, 1717 Ellis St, San Francisco, which said envelope then and there contained and had enclosed a certain letter in words and figures shown by the photostatic copy thereof attached hereto and marked Exhibit "HH" and by this reference incorporated herein and made a part hereof with like effect and for all purposes as though set forth in full herein. [36]

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

COUNT TWENTY-THREE.

And the Grand Jurors on their oaths aforesaid do further present: THAT HARRY M. KASSMIR, CROMWELL SIMON, SAMUEL H. ROBINSON, ORTON E. GOODWIN and J. W. RANDOLPH, the identical parties named in the first count of this indictment, hereinafter called the defendants, so having devised the aforesaid scheme and artifice to defraud and for obtaining money and property under the false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are hereby incorporated by reference thereto in this count as fully and with like effect for all purposes as though the same were here reiterated and repeated, for the purpose of executing said scheme and artifice to defraud, did, on or about September 16, 1925, in

the Southern Division of the Northern District of California, and within the jurisdiction of this court, unlawfully, wilfully, knowingly, and feloniously place and cause to be placed in the United States postoffice at San Francisco, California, to be sent and delivered by the Postoffice Establishment of the United States, a certain postpaid envelope addressed to Mr. W. F. Allen, 1717 Ellis St., San Francisco, which said envelope then and there contained a certain letter in words [37] and figures shown by the photostatic copy thereof attached hereto and marked Exhibit "II" and by this reference incorporated herein and made a part hereof with like effect and for all purposes as though set forth in full herein.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

COUNT TWENTY-FOUR.

And the Grand Jurors on their oaths aforesaid do further present: THAT HARRY M. KASSMIR, CROMWELL SIMON, SAMUEL H. ROBINSON, ORTON E. GOODWIN and J. W. RANDOLPH, the identical parties named in the first count of this indictment, hereinafter called the defendants, so having devised the aforesaid scheme and artifice to defraud and for obtaining money and property under the false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning

which in said first count are hereby incorporated by reference thereto in this count as fully and with like effect for all purposes as though the same were here reiterated and repeated, for the purpose of executing said scheme and artifice to defraud, did, on or about November 4, 1925, unlawfully, wilfully, knowingly and feloniously cause to be delivered by the Postoffice Establishment of the United States, at San Francisco, California, in the Southern Division of the Northern District [38] of California and within the jurisdiction of this court, according to the direction thereon, a certain letter enclosed in a postpaid envelope addressed to Mr. W. F. Allen, 1717 Ellis Street, San Francisco, Calif., which said letter in words and figures shown by the photostatic copy thereof attached hereto and marked Exhibit "JJ" is by this reference incorporated herein and made a part hereof with like effect and for all purposes as though set forth in full herein.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

COUNT TWENTY-FIVE.

And the Grand Jurors on their oaths aforesaid do further present: THAT HARRY M. KASSMIR, CROMWELL SIMON, SAMUEL H. ROBINSON, ORTON E. GOODWIN and J. W. RANDOLPH, the identical parties named in the first count of this indictment, hereinafter called the defendants,

so having devised the aforesaid scheme and artifice to defraud and for obtaining money and property under the false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are hereby incorporated by reference thereto in this count as fully and with like effect for all purposes as though the same were here reiterated and repeated, for the purpose of executing said scheme and artifice to defraud, did, on or [39] *on* October 13, 1925, unlawfully, wilfully, knowingly and feloniously cause to be delivered by the Postoffice Establishment of the United States, at Oakland, California, in the Southern Division of the Northern District of California and within the jurisdiction of this court, according to the direction thereon, a certain letter enclosed in a postpaid envelope, addressed to Miss Mary Esther Durham, 5838 Birth Court, Oakland, California, which said letter in words and figures shown by the photostatic copy thereof attached hereto and marked Exhibit "KK" is by this reference incorporated herein and made a part hereof with like effect and for all purposes as though set forth in full herein.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

COUNT TWENTY-SIX.

And the Grand Jurors on their oaths aforesaid do further present: THAT HARRY M. KASS-

MIR, CROMWELL SIMON, SAMUEL H. ROBINSON, ORTON E. GOODWIN and J. W. RANDOLPH, the identical parties named in the first count of this indictment, hereinafter called the defendants, so having devised the aforesaid scheme and artifice to defraud and for obtaining money and property under the false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are hereby [40] incorporated by reference thereto in this count as fully and with like effect for all purposes as though the same were here reiterated and repeated, for the purpose of executing said scheme and artifice to defraud, did, on or about October 28, 1925, unlawfully, wilfully, feloniously and knowingly cause to be delivered by the Postoffice Establishment of the United States, at Oakland, California, in the Southern Division of the Northern District of California and within the jurisdiction of this court, according to the direction thereon, a certain letter enclosed in a postpaid envelope addressed to Miss Mary Esther Durham, 5838 Birch Court, Oakland, Calif., which said letter in words and figures shown by the photostatic copy thereof attached hereto and marked Exhibit "LL" is by this reference incorporated herein and made a part hereof with like effect and for all purposes as though set forth in full herein.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the

statute of the said United States of America in such case made and provided.

COUNT TWENTY-SEVEN.

And the Grand Jurors on their oaths aforesaid do further present: THAT HARRY M. KASSMIR, CROMWELL SIMON, SAMUEL H. ROBINSON, ORTON E. GOODWIN and J. W. RANDOLPH, the identical parties named in the first count of this indictment, hereinafter called the defendants, so having [41] devised the aforesaid scheme and artifice to defraud and for obtaining money and property under the false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are hereby incorporated by reference thereto in this count as fully and with like effect for all purposes as though the same were here reiterated and repeated, for the purpose of executing said scheme and artifice to defraud, did, on or about February 2, 1926, unlawfully, wilfully, feloniously and knowingly cause to be delivered by the Postoffice Establishment of the United States, at Oakland, California, in the Southern Division of the Northern District of California and within the jurisdiction of this court, according to the direction thereon, a certain letter enclosed in a postpaid envelope addressed to Miss Mary Esther Durham, 5838 Birch Court, Oakland, California, which said letter in words and figures shown by the photostatic copy thereof attached hereto and marked Exhibit "MM"

is by the reference incorporated herein and made a part hereof with like effect and for all purposes as though set forth in full herein.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

COUNT TWENTY-EIGHT.

And the Grand Jurors on their oaths aforesaid do further present: THAT HARRY M. KASSMIR, CROMWELL SIMON, SAMUEL H. ROBINSON, ORTON E. GOODWIN and J. W. RANDOLPH, [42] the identical parties named in the first count of this indictment, hereinafter called the defendants, so having devised the aforesaid scheme and artifice to defraud and for obtaining money and property under the false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are hereby incorporated by reference thereto in this count as fully, and with like effect for all purposes as though the same were here reiterated and repeated, for the purpose of executing said scheme and artifice to defraud, did, on or about February 19, 1926, unlawfully, wilfully, feloniously and knowingly cause to be delivered by the Postoffice Establishment of the United States, at Oakland, California, in the Southern Division of the Northern District of California and within the jurisdiction of this court, according to the direction thereon, a certain letter enclosed in

a postpaid envelope addressed to Miss Mary Esther Durham, 5838 Birch Court, Oakland, California, which said letter in words and figures shown by the photostatic copy thereof attached hereto and marked Exhibit "NN" is by reference incorporated herein and made a part hereof with like effect and for all purposes as though set forth in full herein.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided. [43]

COUNT TWENTY-NINE.

And the Grand Jurors on their oaths aforesaid do further present: THAT HARRY M. KASSMIR, CROMWELL SIMON, SAMUEL H. ROBINSON, ORTON E. GOODWIN and J. W. RANDOLPH, the identical parties named in the first count of this indictment, hereinafter called the defendants, so having devised the aforesaid scheme and artifice to defraud and for obtaining money and property under the false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are hereby incorporated by reference thereto in this count as fully and with like effect for all purposes as though the same were here reiterated and repeated, for the purpose of executing said scheme and artifice to defraud, did, on or about March 15, 1926, unlawfully, wilfully, feloniously and knowingly cause

to be delivered by the Postoffice Establishment of the United States, at Oakland, California, in the Southern Division of the Northern District of California and within the jurisdiction of this court, according to the direction thereon, a certain letter enclosed in a postpaid envelope addressed to Miss Mary Esther Durham, 5838 Birch Court, Oakland, California, which said letter in words and figures shown by the photostatic copy thereof attached hereto and marked Exhibit "OO" is by this reference incorporated herein and made a part hereof with like effect and for all purposes as though set forth in full herein. [44]

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

COUNT THIRTY.

And the Grand Jurors on their oaths aforesaid do further present: THAT HARRY M. KASSMIR, CROMWELL SIMON, SAMUEL H. ROBINSON, ORTON E. GOODWIN and J. W. RANDOLPH, the identical parties named in the first count of this indictment, hereinafter called the defendants, so having devised the aforesaid scheme and artifice to defraud and for obtaining money and property under the false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are hereby incorporated by reference thereto in this count as

fully and with like effect for all purposes as though the same were here reiterated and repeated, for the purpose of executing said scheme and artifice to defraud, did, on or about June 26, 1926, unlawfully, wilfully, feloniously and knowingly cause to be delivered by the Postoffice Establishment of the United States, at Oakland, California, in the Southern Division of the Northern District of California and within the jurisdiction of this court, according to the direction thereon, a certain letter enclosed in a postpaid envelope addressed to Mrs. Emily A. Beans, 5838 Birch Court, Oakland, Calif., which said letter in words and figures shown by the photostatic copy thereof [45] attached hereto and marked Exhibit "PP" is by this reference incorporated herein and made a part hereof with like effect and for all purposes as though set forth in full herein.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

COUNT THIRTY-ONE.

And the Grand Jurors on their oaths aforesaid do further present: THAT HARRY M. KASSMIR, CROMWELL SIMON, SAMUEL H. ROBINSON, ORTON E. GOODWIN and J. W. RANDOLPH, the identical parties named in the first count of this indictment, hereinafter called the defendants, so having devised the aforesaid scheme and artifice to defraud and for obtaining money

and property under the false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are hereby incorporated by reference thereto in this count as fully and with like effect for all purposes as though the same were here reiterated and repeated, for the purpose of executing said scheme and artifice to defraud, did, on or about July 7, 1926, unlawfully, wilfully, feloniously and knowingly cause to be delivered by the Postoffice Establishment of the United States, at Oakland, California, in the Southern Division of the Northern District of California and within the jurisdiction of this court, according to the direction thereon, a certain letter [46] enclosed in a postpaid envelope addressed to Miss Mary Esther Durham, 5838 Birch Court, Oakland, Calif., which said letter in words and figures shown by the photostatic copy thereof attached hereto and marked Exhibit "QQ" is by this reference incorporated herein and made a part thereof with like effect and for all purposes as though set forth in full herein.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

COUNT THIRTY-TWO.

And the Grand Jurors on their oaths aforesaid, do further present: THAT HARRY M. KASSMIR, CROMWELL SIMON, SAMUEL H. ROB-

INSON, ORTON E. GOODWIN and J. W. RANDOLPH, the identical parties named in the first count of this indictment, hereinafter called the defendants, so having devised the aforesaid scheme and artifice to defraud and for obtaining money and property under the false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are hereby incorporated by reference thereto in this count as fully and with like effect for all purposes as though the same were here reiterated and repeated, for the purpose of executing said scheme and artifice, to defraud, did, on or about March 8, 1927, unlawfully, wilfully, feloniously and knowingly cause to be delivered by the Postoffice [47] Establishment of the United States, at Oakland, California, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, according to the direction thereon, the following:

(a) A certain letter in words and figures shown by the photostatic copy thereof attached hereto and marked Exhibit "RR" and by this reference incorporated herein and made a part hereof with like effect and for all purposes as though set forth in full herein.

(b) A carbon copy of a letter in words and figures shown by the photostatic copy thereof attached hereto and marked Exhibit "SS," and by this reference incorporated herein and made a part hereof with like effect and

for all purposes as though set forth in full herein.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

COUNT THIRTY-THREE.

And the Grand Jurors on their oaths aforesaid do further present: THAT HARRY M. KASSMIR, CROMWELL SIMON, SAMUEL H. ROBINSON, ORTON E. GOODWIN and J. W. RANDOLPH, the identical parties named in the first count of this indictment, hereinafter called the defendants, so having devised the aforesaid scheme and artifice to defraud and for obtaining money and property under the false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are hereby [48] incorporated by reference thereto in this count as fully and with like effect for all purposes as though the same were here reiterated and repeated, for the purpose of executing said scheme and artifice to defraud, did, on or about March 8, 1927, unlawfully, wilfully, feloniously and knowingly cause to be delivered by the Postoffice Establishment of the United States, at Oakland, California, in the Southern Division of the Northern District of California and within the jurisdiction of this court, according to the direction thereon, a certain letter enclosed in a postpaid envelope addressed to Mr. John J. Allen, Jr., Attorney at Law,

902 Syndicate Bldg., Oakland, Calif., which said letter in words and figures shown by the photostatic copy thereof attached hereto and marked Exhibit "TT" is by this reference incorporated herein and made a part hereof with like effect and for all purposes as though set forth in full herein.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

COUNT THIRTY-FOUR.

And the Grand Jurors on their oaths aforesaid do further present: THAT HARRY M. KASSMIR, CROMWELL SIMON, SAMUEL H. ROBINSON, ORTON E. GOODWIN, and J. W. RANDOLPH, the identical parties named in the first count of this indictment, hereinafter called the defendants, so having devised the aforesaid scheme and artifice to defraud and for obtaining money and property under the false and fraudulent pretenses, representations and promises described [49] in the first count of this indictment, the allegations concerning which in said first count are hereby incorporated by reference thereto in this count as fully and with like effect for all purposes as though the same were here reiterated and repeated, for the purpose of executing said scheme and artifice to defraud, did, on or about May 16, 1925, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, unlawfully, wilfully, knowingly and

feloniously place and cause to be placed in the United States postoffice at San Francisco, California, to be sent and delivered by the Postoffice Establishment of the United States, a certain postpaid circular addressed to Phil A. Nagen, 3126 Clay, City, the fact thereof being in the words and figures as shown by the photostatic copy thereof attached hereto and marked Exhibit "UU" and by this reference incorporated herein and made a part hereof with like effect for all purposes as though set forth in full herein; and the back thereof being in the words and figures as shown by the photostatic copy thereof attached hereto and marked Exhibit "VV" and by this reference incorporated herein and made a part hereof with like effect for all purposes as though set forth in full herein.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

COUNT THIRTY-FIVE.

And the Grand Jurors on their oaths aforesaid, do further present: THAT HARRY M. KASSMIR, CROMWELL SIMON, SAMUEL H. ROBINSON, ORTON E. GOODWIN and J. W. RANDOLPH, [50] the identical parties named in the first count of this indictment, hereinafter called the defendants, so having devised the aforesaid scheme and artifice to defraud and for obtaining money and property under the false and fraudulent pretenses, representations and promises described in the first count of this indictment, the al-

legations concerning which in said first count are hereby incorporated by reference thereto in this count as fully and with like effect for all purposes as though the same were here reiterated and repeated, for the purpose of executing said scheme and artifice to defraud, did, on or about July 25, 1925, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, unlawfully, wilfully, knowingly and feloniously place and cause to be placed in the United States postoffice at San Francisco, California, to be sent and delivered by the Postoffice Establishment of the United States, a certain envelope addressed to Mr. Leroy F. Pike, City Attorney, Reno, Nevada, which said envelope then and there contained and had enclosed therein a certain two-page letter, which said letter in words and figures shown by the photostatic copy thereof attached hereto and marked Exhibits "WW" and "XX" is by this reference incorporated herein and made a part hereof with like effect and for all purposes as though set forth in full herein.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided. [51]

COUNT THIRTY-SIX.

And the Grand Jurors on their oaths aforesaid, do further present: THAT HARRY M. KASSMIR, CROMWELL SIMON, SAMUEL H. ROBINSON, ORTON E. GOODWIN and J. W. RANDOLPH, the identical parties named in the first

count of this indictment, hereinafter called the defendants, so having devised the aforesaid scheme and artifice to defraud and for obtaining money and property under the false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are hereby incorporated by reference thereto in this count as fully and with like effect for all purposes as though the same were here reiterated and repeated, for the purpose of executing said scheme and artifice to defraud, did, on or about August 26, 1925, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, unlawfully, wilfully, knowingly and feloniously place and cause to be placed in the United States postoffice at San Francisco, California, to be sent and delivered by the Postoffice Establishment of the United States, a certain postpaid envelope addressed to LeRoy F. *Pk,e* Esq., Attorney-at-law, City Hall, Reno, Nevada, which said envelope then and there contained and had enclosed a certain two-page letter, which said letter in words and figures shown by the photostatic copy thereof attached hereto and marked Exhibits "YY" and "ZZ" is by this reference incorporated herein and made a part hereof with like effect and for all purposes as though set *forth in*
[52]

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made ad provided.

COUNT THIRTY-SEVEN.

And the Grand Jurors on their oaths aforesaid, do further present: THAT HARRY M. KASSMIR, CROMWELL SIMON, SAMUEL H. ROBINSON, ORTON E. GOODWIN and J. W. RANDOLPH, the identical parties named in the first count of this indictment, hereinafter called the defendants, so having devised the aforesaid scheme and artifice to defraud and for obtaining money and property under the false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are hereby incorporated by reference thereto in this count as fully and with like effect for all purposes as though the same were here reiterated and repeated, for the purpose of executing said scheme and artifice to defraud, did, on or about August 31, 1925, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, unlawfully, wilfully, knowingly and feloniously place and cause to be placed in the United States postoffice at San Francisco, California, to be sent and delivered by the Postoffice Establishment of the United States, a certain postpaid envelope addressed to Leroy F. Pike, Esq., Attorney-at-law, Reno, Nevada, which said envelope then and there contained and had enclosed therein a certain letter, which said letter in words [53] and figures shown by the photostatic copy thereof attached hereto and marked Exhibit "AAA" is by this refer-

ence incorporated herein and made a part hereof with like effect and for all purposes as though set forth in full herein.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made ad provided.

COUNT THIRTY-EIGHT.

And the Grand Jurors on their oaths aforesaid, do further present: THAT HARRY M. KASSMIR, CROMWELL SIMON, SAMUEL H. ROBINSON, ORTON E. GOODWIN and J. W. RANDOLPH, the identical parties named in the first count of the indictment, hereinafter called the defendants, so having devised the aforesaid scheme and artifice to defraud and for obtaining money and property under the false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are hereby incorporated by reference thereto in this count as fully and with like effect for all purposes as though the same were here reiterated and repeated, for the purpose of executing said scheme and artifice to defraud, did, on or about September 18, 1925, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, unlawfully, wilfully, knowingly and feloniously place and cause to be placed in the United States postoffice at San Francisco, California, to be [54] sent and delivered by the Postoffice Establishment of the United States a certain postpaid envelope

addressed to LeRoy F. Pike, Esq., Attorney-at-law, City Hall, Reno, Nevada, which said envelope contained a certain letter in words and figures shown by the phototstatic copy thereof attached hereto and marked Exhibit "BBB" and which said letter is by this reference incorporated herein and made a part hereof with like effect and for all purposes as though set forth in full herein.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

GEO. J. HATFIELD,
United States Attorney.

[Endorsed]: A true bill.

W. A. BECHTEL,
Foreman Grand Jury.

Presented in open court and ordered filed Feb. 21, 1928. [55]

EXHIBIT "A."

CROMWELL SIMON & COMPANY
Mills Building
220 Montgomery Street
San Francisco

High Grade Investment Securities
All Standard Oil Stocks
Unlisted Stocks
Bonds

Telephone
Kearny 6940

April
22nd
1925

Mr. Gustave A. Johnson,
P. O. Box 53,
Chualar, California.

Dear Mr. Johnson:

We are very pleased to welcome you as a client of our organization and you will find enclosed our certificate covering your purchase of twenty shares of Standard Oil of California stock.

We acknowledge receipt of the following collateral to apply on the above partial payment account:
—8 Di Giorgio Fruit Corporation units.

We shall always be pleased to serve you and you may call on us at any time for any information regarding securities of any kind concerning which you desire information.

We particularly ask that you bring to our attention any item or part of your transaction that is not

entirely clear or satisfactory, because it is our wish to have satisfied clients exclusively. We draw to your attention the enclosed pamphlet, entitled the Cromwell Simon & Company Plan, which gives you complete details of our method for the acquisition of high-grade securities on a partial payment basis.

Will you be good enough to carefully review the figures on your certificate of purchase because we shall be governed entirely by these figures and your purchase agreement.

We trust to have the pleasure of serving you again in the near future.

Very truly yours,
CROMWELL SIMON & COMPANY
ORTON E. GOODWIN

OEG:W. [56]

EXHIBIT "B."

CROMWELL SIMON & COMPANY

CERTIFICATE

THIS IS TO CERTIFY, that CROMWELL SIMON & COMPANY has this 20th day of April 1925, agreed to sell and deliver to Gustave A. Johnson, the following named securities:

20 Shares of S. O. of Calif. Stock @ $58.50 per share, Total $1170.00, upon which $234.00 has been paid leaving a balance, including service charge, of $1029.60.

.....Shares of .....Stock @ $..... per share, Total $....., upon which $..... has been paid leaving a balance, including service charge, of $.....

.....Shares of ..... Stock @ $..... per share, Total $....., upon which $..... has been paid leaving a balance, including service charge, of $.....,

on THE CROMWELL SIMON & COMPANY PLAN in conformity with terms and conditions contained in agreement this day executed which calls for completion of payment of said balance for the above mentioned securities in ten (10) installments of $102.96 each, together with interest from the above date on deferred payments at 6%, each installment to come due every ninety (90) days from above date.

IT IS FURTHER AGREED, that Gustave A. Johnson may at his option complete payment at an earlier date.

CROMWELL SIMON & COMPANY.
By V. A. PARKS

This certificate to be surrendered upon delivery of securities mentioned or cancellation of contract. [57]

EXHIBIT "C."

[Reverse side of Certificate—Cromwell Simon & Company.] [58]

EXHIBIT "D."

THE CROMWELL SIMON & COMPANY PLAN.

The Cromwell Simon & Company plan is a method for the acquisition by easy payments, of high grade securities, listed on the New York Stock Exchange. Fortunes have been lost by investors in promoted enterprises and many strong boxes are filled with certificates representing ownership in worthless securities.

Making Good Investments

By means of the Cromwell Simon & Company plan, high grade dividend paying securities of the greatest and most successful corporations of the country may be acquired on the basis of one-fifth down and the balance in ten equal quarterly payments.

After the first payment, your account is credited with all dividends, cash or stock, that are declared on the stocks you are acquiring.

The plan enables you to control five times the stock you could purchase for cash—thereby giving five times the profit possibilities.

Thus if you should have $500, you could buy only 10 shares of stock at $50 a share, but with the Cromwell Simon & Company plan, you could buy 50 shares. So that if your Stock should go to $80 a share, instead of making $300, you would make $1500, less the service charge.

Easy Payment Plan

For Example:

Buy 10 shares at $50	$500.00
Initial payment	100.00
Balance due	$400.00
Service charge one-tenth of unpaid balance	40.00
Total	$440.00
10 payments due every three months	$ 44.00

Initial Deposit

The initial deposit required on listed stocks and bonds is one-fifth of the total purchase price. Balance is payable in equal installments in 30, 60 or 90 days. We charge 6 per cent bank interest on deferred balance, which is usually offset—often more than offset—by credit for dividends.

How to Own $60,000

If a man of thirty will buy $100 monthly, or $1,200 a year, of standard investments and continue to reinvest the income of say 8% average a year, together with his $100 monthly, he should be able to retire with $60,000 in securities and $300 to $400 or more monthly income, according to the interest rate, when he is fifty. This is three times the amount saved each month during the twenty years.

This tabulation makes no provisions for enhanced valuation of securities which could conceivably double or treble the principal. Had investment been made in leading oil stocks, such as are recommended by CROMWELL SIMON & COMPANY, this result could have been achieved.

We do not desire you to overbuy. Make your payments conform with your expected savings. Start by buying good securities now.

You may order us to sell all or any part of your holdings at any time.

You may pay up balance at any time, when we shall deliver to you your securities.

As an alternative, good stocks or bonds may be used as collateral for the initial or any subsequent payment, in which event the dividends, both on the securities used as collateral and owned by you, and those being purchased through us, go to the buyer's account.

Our Guarantee

We guarantee that regardless of the fluctuations and price of the securities, bought on the Cromwell Simon & Company plan of easy payments, that under no conditions whatsoever will we call for any money except the regular payments at the specified time. Under no circumstances will any margin calls be made on the purchaser.

Our Fee

For our service charge we charge no commissions either for buying or selling, but a flat charge of one-tenth of the unpaid balance which covers the guarantee, carrying charges, brokerage commissions for buying and selling, transfer taxes and the complete service of Cromwell Simon & Company. The service charge is added to the unpaid balance and is included in the monthly payments.

As soon as the initial payment is made, we issue to you our formal certificate of purchase, which shows the securities contracted for and the payments required thereon.

Transfer Instructions

When you make final payment on securities, you will then notify us of the name in full and the address of the person to whom you want the securities issued and actual delivery of the stock will be made as soon as received from the transfer office.

If You Now Own Securities

If the investor already owns sound securities (we will be glad to give them a rating on request), they can be used to secure the purchase of additional sound securities. By depositing these with CROMWELL SIMON & COMPANY as security, they take the place, up to their full loan value, of the initial or (and) subsequent payment required on the new purchases, and the balance can be paid on the CROMWELL SIMON & COMPANY Plan, namely, by ten consecutive quarterly installments.

The owner of securities can, without incurring any obligation whatever and without expense, merely give us a list of his present holdings, and we will gladly inform him not only of the present value of same, but also what other investments we would suggest buying in addition, and what quantity and value in new investments his "collateral" will cover. [59]

EXHIBIT "E."

Leading Features
of the
CROMWELL SIMON & CO.
Investment Plan

Available to investors small and large, the following privileges mark the Cromwell Simon & Company Investment Plan as a safe and sound method of acquiring nationally known securities which are listed on the New York Stock Exchange, in America's leading corporations.

1 The purchase of sound securities with a nominal deposit and ten installments every three months, at prevailing market prices.

2 No other liability, premiums, or payments beyond the initial and quarterly payments, with interest at 6 per cent on deferred balance.

3 No margin calls.

4 Diversified investments.

5 Complete control of the account by the investor.

6 Participation in all dividends or stock distributions while paying off the balance, from the time they are bought.

7 Privilege to use securities in place of cash for initial or subsequent payments.

8 Larger payments or payment in full accepted any time.

9 When additional securities are purchased, quarterly installments on the entire account may be renewed for the full 10-payment period, if client so desires.

10 Paid-in payments may after a time be used as initial payment on additional investments.

11 Securities, any time paid for, immediately delivered in accordance with customer's instructions.

12 Completely satisfactory individual service.

13 Service charge that does not vary; *i. e.* one-tenth of unpaid balance.

The

CROMWELL SIMON & CO.

Investment Plan

Announcing a service for the sale to clients, on a partial payment basis, of gilt-edge investment securities, listed on the New York Stock Exchange.

CROMWELL SIMON & CO.
Private Exchange
Telephone Kearny 6940
Suite 210–224 Mills Building
220 Montgomery Street
San Francisco. [60]

EXHIBIT "F."

CROMWELL SIMON & COMPANY
Mills Building
220 Montgomery Street
San Francisco

High Grade Investment Securities
All Standard Oil Stocks
Unlisted Stocks
Bonds

Telephone
Kearny 6940

July
7th,
1925.

Mr. G. A. Johnson,
P. O. Box 53,
Chualar, Calif.

My dear Friend Gus—

Your letter of June 24th, addressed to Mr. William Wallace, has been brought to my attention. I believe the questions you ask in this letter were answered in mine of a few days ago to you.

I wish to again assure you that your transaction with Cromwell Simon & Company will be of financial benefit beyond any question.

Should you at any time wish information regarding your investment or our standing, please communicate with me.

Hoping that I may again have the pleasure of

serving you to the extent that your capital will be materially increased, I am

Sincerely yours,
J. W. RANDOLPH.

JWR:R. [61]

EXHIBIT "G."

Private Exchange
Kearny 6940

220 Montgomery St.
San Francisco, Calif.
Jul. 13, 19

Gustave A. Johnson,
P. O. Box 53
Chualar, Calif.

You are hereby notified that a payment of $102.96 on your purchase of 20 shares of Stand. Oil of Calif. stock will be due and payable to the undersigned on July 20, 1925.

CROMWELL SIMON & COMPANY
Accounting Department

Payment Due.....$102.96
Interest .....$ 18.95

Total $121.91
Less Dividends....$ 10.

Amount Due.....$111.91 [62]

EXHIBIT "H."

CROMWELL SIMON & COMPANY
Mills Building
220 Montgomery Street
San Francisco

High Grade Investment Securities
All Standard Oil Stocks
Unlisted Stocks
Bonds

Telephone
Kearny 6940

October
twenty-ninth
1925

Mr. Gustave A. Johnson,
P. O. Box 53,
Chualar, Calif.

Dear Mr. Johnson:

Your letter of October 26th addressed to Mr. Randolph has been given to me with a request that I reply to it.

Due to the fact that a statement showing payment due on your Standard Oil of California account was not properly addressed, it was returned by the Post Office authorities, and consequently, an unavoidable delay occured. A second statement was mailed to you a few days ago which we feel confident is in your possession.

It is true that most of the substantial companies' stocks have been rather quiet market-wise, nevertheless we feel that the improvement in the oil industry will be reflected in the market price

of stocks such as you hold, in the not too distant future. Upon completion of the payments your contract calls for stock certificates which will be delivered to you.

We do not have such additional information regarding the Di Giorgio Fruit Corporation stock that you undoubtedly desire, with the exception that the market value of this stock has increased to quite some extent during the last few months. As soon as an earning statement can be had, we should be glad to send you a special report.

Yours very truly,
CROMWELL SIMON & COMPANY,
By HARRY KASSMIR.

HK/ [63]

EXHIBIT "I."

CROMWELL SIMON & COMPANY
Mills Building
220 Montgomery Street
San Francisco

High Grade Investment Securities
All Standard Oil Stocks — Telephone
Unlisted Stocks — Kearny 6940
Bonds

(Copy)

PAYMENT NOTICE

Gustave A. Johnson,
Chualar, Calif.

A payment of $102.96 will come due on your pur-

chase of 20 shares of Standard Oil of California stock on October 20, 1925.

Payment .....$102.96.
Interest 17.41

120.37
Dividends 10.00

110.37

CROMWELL SIMON & COMPANY,
1403 Hobart Building,
San Francisco. [64]

EXHIBIT "J."

CROMWELL SIMON & COMPANY
~~Mills~~ ~~Building~~
~~220~~ ~~Montgomery~~ ~~Street~~
San Francisco
1403 Hobart Bldg.

High Grade Investment Securities
All Standard Oil Stocks
Unlisted Stocks
Bonds

Telephone
Kearny 6940

May
thirteenth
1926

Mr. J. A. Bardin,
Attorney-at-law,
Salinas, California.

Dear Sir:

The following is an itemized account of Gustav A. Johnson with Cromwell Simon & Company:

DEBITS:

1925			
Apr. 20	20 Standard Oil of Calif. @ 58½		$1170.00
" "	Service charge		93.60
" "	8 Di Georgia Fruit Units Rec'd		
" "	Interest		18.95
Oct. 20	Interest		17.41
1926			
May 5	Interest		37.31
			1337.21

CREDITS:

1925			
June 15	Div. S. C. D.	$ 10.00	
July 20	Check	111.91	
Sept. 15	Div.	10.00	
Dec. 15	Div.	10.00	
1926			
Mar. 15	Div.	10.00	
			151.91

Long: 20 Standard Oil of Calif.;
8 Units Di Georgia Fruit.

If you will apprise me when you desire to liquidate this account, we will advise you where to send the balance due in order to receive delivery of your 20 shares of Standard Oil and 8 Units of Di Georgia Fruit Co.

Very truly yours,
CROMWELL SIMON & COMPANY.
By HARRY M. KASSMIR.

J.A.B. [65]

EXHIBIT "K."

CROMWELL SIMON & COMPANY
Mills Building
220 Montgomery Street
San Francisco

High Grade Investment Securities
All Standard Oil Stocks
Unlisted Stocks
Bonds

Telephone
Kearny 6940

June 24th, 1925.

Mr. S. Tiger,
1828 Anza St.,
San Francisco, Calif.

Dear Mr. Tiger:

Thank you for your inquiry concerning Dodge Motors.

The enclosed report will give you very complete information concerning the Company.

You can unquestionably consider the preferred stock as a gilt-edge dividend-paying investment, and the common stock as an investment for profits of the highest order.

We believe that both the common and preferred stock will be selling at much higher prices, particularly the common.

You may purchase through us either or both of these issues on the basis of one-fifth down and the balance in ten subsequent payments, ninety days apart.

We shall be very glad to welcome you as one of our clients, and believe you cannot possibly do better than accumulate a few shares of Dodge, either for investment or profit.

Purchases at the present time should net you large profits within the near future.

Very truly yours,
CROMWELL SIMON & COMPANY.
ORTON E. GOODWIN.

OEG/B. [66]

EXHIBIT "L."

SPECIAL REPORT
on
DODGE BROTHERS, INC.
Capital Stock

	Authorized	Outstanding
$7.00 cum. Preferred (no par)	850,000 sh.	850,000 sh.
Class "A" Common (no par)	*2,535,000 sh.	1,500,000 sh.
Class "B" Common (no par)	500,000 sh.	500,000 sh.

Class "A" and Class "B" Common Stock are identical in all respects, except that Class "A" has no voting power and Class "B" has exclusive voting power.

---

*Of which 689,285 shares reserved for conversion of 6% Gold Debentures.

FUNDED DEBT.

Convertible Gold Debentures, 6%.....$75,000,000.

GENERAL.

The Company is the third largest manufacturer of automobiles in the world. It is also a large producer of trucks.

In 1914, production of cars was 349, and since that time nearly 1,300,000 cars have been produced. In 1924 the Company sold 222,236 cars, or a sales value of $191,652,446. The Company is a new organization, having acquired all the assets (except $14,000,000. cash) of the old Dodge Brothers Company, the stock of which was not listed on the New York Stock Exchange. The new company of Dodge Brothers, Inc., was organized April 8, 1925, and has not as yet inaugurated dividend payments. Dividends at the rate of $7.00 a share, or an approximate yield of 9%, will be paid quarterly on the preferred stock. No announcement has yet been made regarding dividends on the common stock.

Both the preferred stock and the common stock can be considered to hold an exceptional market opportunity.

The stock was originally offered in units of one share preferred and one of common at $100.00, and was over-subscribed ten times over.

The stock has now been segregated and both the preferred and common stock are listed on the New York Stock Exchange. The preferred stock is not only a gilt-edge investment, but may be considered

to have exceptional opportunities for an increase in price.

Evidence of the expectations of the Board of Directors of Dodge Brothers, Inc., regarding the Common stock may be indicated by the arrangements made to convert the debentures into "A" stock. These arrangements are on a sliding scale, as follows:—

For the first $5,000,000 debentures converted, 1 share of com. "A" stock for each $30 of debentures.

For the second $5,000,000 debentures converted, 1 share of com. "A" stock for each $35 of debentures.

For the third $5,000,000 debentures converted, 1 share of com. "A" stock for each $40 of debentures.

For the fourth $5,000,000 debentures converted, 1 share of com. "A" stock for each $50 of debentures.

For the fifth $5,000,000 debentures converted, 1 share of com. "A" stock for each $60 of debentures.

For the sixth $5,000,000 debentures converted, 1 share of com. "A" stock for each $70 of debentures.

The "B" stock is not for sale.

The old Dodge Company paid 160% in dividends in 1921, 60% dividends in 1922, no dividends in 1923, 14% in 1924 and 12% in 1925. In addition it paid a 400% stock dividend in 1922.

CROMWELL SIMON & COMPANY

210–223–224–224A Mills Bldg.
220 Montgomery Street
San Francisco

Dealers in
High Grade Investment Securities
All Standard Oil Stocks — Kearny 6940
Unlisted Stocks — Private Exchange
Bonds

The statements presented in this circular while not guaranteed, have been taken from sources which we believe to be reliable. [67]

EXHIBIT "M."
2.

PROFITS.

After allowing for interest on the debentures and $7.00 per share on the preferred stock, present earnings are running at the rate of $7.00 per share on the common stock.

It is estimated by President Haynes that the first six months' earnings for 1925 will be over $14,000,000 as against nearly $20,000,000 for the full year of 1924.

Earnings of $14,000,000 for the first six months would be sufficient to cover:—

(1) A full year's interest and sinking fund on $75,000,000 worth of debentures.

(2) A full year's dividends at $7.00 per share on the preferred stock.

(3) And leave almost $2,500,000 over.

This would indicate that the second six months' earnings, together with the $2,500,000 for the first six months, would be available for dividends on the common stock.

Based on the new capitalization, in 1924 the Company earned $18.19 per share on its preferred stock, $4.76 per share on the common stock and earned its interest and preferred stock dividends nearly twice over.

Although the Company is operating at the rate of 1100 cars a day, this is said to be 200 a day behind the orders received.

RECOMMENDATIONS.

Based on the foregoing facts and figures, we can unquestionably recommend Dodge Brothers, Inc., both preferred and common stocks, as an investment of the highest order. The preferred stock may be considered a dividend-paying stock of the highest order, while the common stock should be bought and accumulated both for market profit and future dividends.

CROMWELL SIMON & COMPANY

210–223–224–224A Mills Bldg
220 Montgomery Street
San Francisco

Dealers in
High Grade Investment Securities
All Standard Oil Stocks
Unlisted Stocks Private Exchange
Bonds Kearny 6940

The statements presented in this circular while not guaranteed, have been taken from sources which we believe to be reliable. [68]

EXHIBIT "N."

CROMWELL SIMON & COMPANY
Mills Building
220 Montgomery Street
San Francisco

High Grade Investment Securities
All Standard Oil Stocks
Unlisted Stocks
Bonds

Telephone
Kearny 6940

June
30th,
1925.

Mrs. Annie G. Tiger,
1828 Anza Street,
San Francisco.

Dear Mrs. Tiger:—

Thank you for your order of 100 shares of Dodge Brothers Class "A" stock, accompanied by deposit of $25.00.

We shall have very much pleasure in sending you our formal Certificate of Purchase on this account as soon as the balance of the initial payment is made.

In our opinion, you have made a very wise selection in Dodge "A," as we know of no security on the New York Stock Exchange which has such an immediately bright prospect before it as has the

stock of the amazing Dodge Brothers, now the third largest automobile manufacturers in the world.

Very truly yours,
CROMWELL SIMON & COMPANY.
ORTON E. GOODWIN.

OEG:R. [69]

EXHIBIT "O."

CROMWELL SIMON & COMPANY
Mills Building
220 Montgomery Street
San Francisco

High Grade Investment Securities
All Standard Oil Stocks
Unlisted Stocks
Bonds

Telephone
Kearny 6940

July
2nd,
1925.

Mrs. Annie G. Tiger,
1828 Anza Street,
San Francisco.

Dear Mrs. Tiger:—

We are very pleased to welcome you as a client of our organization, and you will find enclosed our Certificate covering your purchase of 100 shares of Dodge "A" stock.

We shall always be pleased to serve you and you may call on us at any time for any information you may desire regarding securities of any kind.

We particularly ask that you bring to our attention any item or part of your transaction that is not entirely clear or satisfactory, because it is our wish to have satisfied clients exclusively. We draw to your attention the enclosed pamphlet, entitled THE CROMWELL SIMON & COMPANY INVESTMENT PLAN, which gives you complete information regarding our method for the acquisition of high-grade securities on a partial payment basis.

Will you be good enough to carefully review the figures on your Certificate of Purchase because we shall be governed entirely by these figures and your Purchase Agreement.

We trust to have the pleasure of serving you again in the near future.

Very truly yours,
CROMWELL SIMON & COMPANY.
ORTON E. GOODWIN.

OEG:R. [70]

EXHIBIT "P."

CROMWELL SIMON & COMPANY
Mills Building
220 Montgomery Street
San Francisco

High Grade Investment Securities
All Standard Oil Stocks
Unlisted Stocks
Bonds

Telephone
Kearny 6940

September
5th,
1925.

Mrs. Annie G. Tiger,
1828 Anza Street,
San Francisco, Calif.

Dear Mrs. Tiger:—

We are pleased to enclose herewith our Certificate covering your purchase of fifty shares of Standard Oil of California stock.

We particularly ask that you bring to our attention any item or part of your transaction that is not entirely clear or satisfactory, because it is our wish to have satisfied clients exclusively.

Trusting that we may have the pleasure of serving you again in the near future, we are

Very truly yours,
CROMWELL SIMON & COMPANY.
J. W. RANDOLPH.

JWR:R. [71]

EXHIBIT "Q."

CROMWELL SIMON & COMPANY
CERTIFICATE

THIS IS TO CERTIFY that CROMWELL SIMON & COMPANY has this 5th day of September, 1925, agreed to sell and deliver to Annie G. Tiger the following named securities;

50 Shares of Standard Oil of Cal. Stock @ $53–⅜ per share, Total $2668.75 upon which $530.00 has been paid leaving a balance, including service charge, of $2352.63.

.....Shares of ..... Stock @ $..... per share, Total $..... upon which $..... has been paid leaving a balance, including service charge, of $.....

..... Shares of ..... Stock @ $..... per share, Total $..... upon which $..... has been paid leaving a balance, including service charge, of $.....

on THE CROMWELL SIMON & COMPANY PLAN in conformity with terms and conditions contained in agreement this day executed which calls for completion of payment of said balance for the above-mentioned securities in ten (10) installments of $235.26 each, together with interest from the above date on deferred payments at 6%, each installment to come due every Ninety (90) days from above date.

IT IS FURTHER AGREED, that Annie G. her
Tiger may at ~~his~~ option complete payment at an earlier date.

CROMWELL SIMON & COMPANY.
By V. A. PARKS.

This certificate to be surrendered upon delivery of securities mentioned or cancellation of contract. [72]

EXHIBIT "R."

[Reverse side of certificate—Cromwell Simon & Company.] [73]

EXHIBIT "S."

SAMUEL H. ROBINSON
Attorney at Law
Hobart Building
San Francisco

May
fourteenth
1926.

Mrs. Anna Tiger,
1828 Anza St., Apt. 2,
San Francisco,
California.

Dear Mrs. Tiger:

In accordance with my telephone conversation of today, I am enclosing my personal check in the sum

of $50.00 on behalf of partial settlement of your account with Cromwell Simon & Company.

Very truly yours,
SAMUEL H. ROBINSON.

SHR:MC.
1 Encl.
Received June 1, 1926. Office—Secy. State. [74]

EXHIBIT "T."

CROMWELL SIMON & COMPANY
Mills Building
220 Montgomery Street
San Francisco

High Grade Investment Securities
All Standard Oil Stocks
Unlisted Stocks
Bonds

Telephone
Kearny 6940

April
First.
1925.

Mr. Ernest C. Hipp,
543 Monroe,
Santa Clara, Calif.

Dear Mr. Hipp:

We are very pleased to welcome you as a client of our organization and you will find enclosed our certificate covering your purchase of 40 shares of Standard Oil of California and 40 shares of Studebaker Corporation stock.

We acknowledge receipt of the following collateral to apply on the above partial payment account.—30 shares of Durant of California—35 shares of Durant of Delaware—and 20 shares of Hayes Hunt.

We shall always be pleased to serve you and you may call on us at any time for any information regarding securities of any kind concerning which you desire information.

We particularly ask that you bring to our attention any item or part of your transaction that is not entirely clear or satisfactory, because it is our wish to have satisfied clients exclusively. We draw to your attention the enclosed pamphlet, entitled the Cromwell Simon & Company Plan, which gives you complete details of our method for the acquisition of high-grade securities on a partial payment basis.

Will you be good enough to carefully review the figures on your certificate of purchase because we shall be governed entirely by these figures and your purchase agreement.

We trust to have the pleasure of serving you again in the near future.

Very truly yours,

CROMWELL SIMON & COMPANY.

E. HOFFMAN.

OEG./H. [75]

EXHIBIT "U."

THE CROMWELL SIMON & COMPANY PLAN.

The Cromwell Simon & Company plan is a method for the acquisition by easy payments, of high grade securities, listed on the New York Stock Exchange. Fortunes have been lost by investors in promoted enterprises and many strong boxes are filled with certificates representing ownership in worthless securities.

Making Good Investments

By means of the Cromwell Simon & Company plan, high grade dividend paying securities of the greatest and most successful corporations of the country may be acquired on the basis of one-fifth down and the balance in ten equal quarterly payments.

After the first payment, your account is credited with all dividends, cash or stock, that are declared on the stocks you are acquiring.

The plan enables you to control five times the stock you could purchase for cash—thereby giving five times the profit possibilities.

Thus if you should have $500, you could buy only 10 shares of stock at $50 a share, but with the Cromwell Simon & Company plan, you could buy 50 shares. So that if your stock should go to $80 a share, instead of making $300, you would make $1500, less the service charge.

Easy Payment Plan

For Example:

Buy 10 shares at $50	$500.00
Initial payment	100.00
Balance due	$400.00
Service charge one-tenth of unpaid balance.	40.00
Total	$440.00
10 payments due every three months	$ 44.00

Initial Deposit

The initial deposit required on listed stocks and bonds is one-fifth of the total purchase price. Balance is payable in equal installments in 30, 60 or 90 days. We charge 6 per cent bank interest on deferred balance, which is usually offset—often more than offset—by credit for dividends.

How to Own $60,000.

If a man of thirty will buy $100 monthly, or $1,200 a year, of standard investments and continue to reinvest the income of say 8% average a year, together with his $100 monthly, he should be able to retire with $60,000 in securities and $300 to $400 or more monthly income, according to the interest rate, when he is fifty. This is three times the amount saved each month during the twenty years.

This tabulation makes no provisions for enhanced valuation of securities, which could conceivably double or treble the principal. Had investment been made in leading oil stocks, such as are recommended by CROMWELL SIMON & COMPANY, this result could have been achieved.

We do not desire you to overbuy. Make your payments conform with your expected savings. Start by buying good securities now.

You may order us to sell all or any part of your holdings at any time.

You may pay up balance at any time, when we shall deliver to you your securities.

As an alternative, good stocks or bonds may be used as collateral for the initial or any subsequent payment, in which event the dividends, both on the securities used as collateral and owned by you, and those being purchased through us, go to the buyer's account.

Our Guarantee

We guarantee that regardless of the fluctuations and price of the securities, bought on the Cromwell Simon & Company plan of easy payments, that under no conditions whatsoever will we call for any money except the regular payments at the specified time. Under no circumstances will any margin calls be made on the purchaser.

Our Fee

For our service charge we charge no commissions either for buying or selling, but a flat charge of one-tenth of the unpaid balance which covers the guarantee, carrying charges, brokerage commissions for buying and selling, transfer taxes and the complete service of CROMWELL SIMON & COMPANY. The service charge is added to the unpaid balance and is included in the monthly payments.

As soon as the initial payment is made, we issue to you our formal certificate of purchase, which shows the securities contracted for and the payments required thereon.

Transfer Instructions

When you make final payment on securities, you will then notify us of the name in full and the address of the person to whom you want the securities issued and actual delivery of the stock will be made as soon as received from the transfer office.

If You Now Own Securities

If the investor already owns sound securities (we will be glad to give them a rating on request), they can be used to secure the purchase of additional sound securities. By depositing these with CROMWELL SIMON & COMPANY as security, they take the place, up to their full loan value of the initial or (and) subsequent payment required on the new purchases, and the balance can be paid on the CROMWELL SIMON & COMPANY Plan, namely, by ten consecutive quarterly installments.

The owner of securities can, without incurring any obligation whatever and without expense, merely give us a list of his present holdings, and we will gladly inform him not only of the present value of same, but also what other investments we would suggest buying in addition, and what quantity and value in new investments his "collateral" will cover.

[76]

EXHIBIT "V."

Leading Features
of the
CROMWELL SIMON & CO.
Investment Plan

Available to investors small and large, the following privileges mark the CROMWELL SIMON & COMPANY INVESTMENT PLAN as a safe and sound method of acquiring nationally known securities which are listed on the New York Stock Exchange, in America's leading corporations.

1 The purchase of sound securities with a nominal deposit and ten installments every three months, at prevailing market prices.

2 No other liability, premiums, or payments beyond the initial and quarterly payments, with interest at 6 per cent on deferred balance.

3 *No margin calls.*

4 Diversified investments.

5 Complete control of the account by the investor.

6 Participation in all dividends or stock distributions while paying off the balance, from the time they are bought.

7 Privilege to use securities in place of cash for initial or subsequent payments.

8 Larger payments or payment in full accepted any time.

9 When additional securities are purchased, quarterly installments on the entire account may be re-

newed for the full 10-payment period, if client so desires.

10 Paid-in payments may after a time be used as initial payment on additional investments.

11. *Securities, any time paid for, immediately delivered in accordance with customer's instructions.*

12 Completely satisfactory individual service.

13 Service charge that does not vary; *i. e.,* one-tenth of unpaid balance.

[In Ink:] Ernest Hipp.

The

CROMWELL SIMON & CO.

Investment Plan.

Announcing a service for the sale to clients, on a partial payment basis, of gilt-edge investment securities, listed on the New York Stock Exchange.

CROMWELL SIMON & CO.
Private Exchange
Telephone Kearny 6940.
Suite 210–224 Mills Building
220 Montgomery Street
San Francisco. [77]

EXHIBIT "W."

CROMWELL SIMON & COMPANY

CERTIFICATE

THIS IS TO CERTIFY, *that* CROMWELL SIMON & COMPANY has this 31st day of March,

1925, agreed to sell and deliver to Ernest Hipp, the following named securities:

40 Shares of Std. Oil of Calif. Stock @ $59¼ per share, Total $2370.00 upon ~~which~~ $..... ~~has been paid leaving a balance, including service charge, of~~ $.....

40 Shares of Studebaker Corp. Stock @ $43½ per share, Total $1740.00, upon which $822.00 has been paid leaving a balance, including service charge, of $3616.80.

..... Shares of ..... Stock @ ..... per share, Total $....., upon which $..... has been paid leaving a balance, including service charge, of $.....

on THE CROMWELL SIMON & COMPANY PLAN in conformity with terms and conditions contained in agreement this day executed which calls for completion of payment of said balance for the above mentioned securities in ten (10) installments of $361.68 each, together with interest from the above date on deferred payments at 6%, each installment to come due every Ninety (90) days from above date.

IT IS FURTHER AGREED, that Ernest Hipp may at his option complete payment at an earlier date.

CROMWELL SIMON & COMPANY
By V. A. PARKS

This certificate to be surrendered upon delivery of securities mentioned or cancellation of contract.
[78]

EXHIBIT "X."

[Reverse side of certificate—Cromwell Simon & Company.] [79]

EXHIBIT "Y."

CROMWELL SIMON & COMPANY
Investment Securities
San Francisco

Mch. 31, 1925.

Mr. Ernest Hipp
543 Monroe St.
Santa Clara

We acknowledge receipt from you today of the following:

Securities.	~~Check~~	~~Cash~~
35 Durant of Delaware		
30 Durant of Calif.		
20 Hayes Hunt (common)		

which has been credited to your Collateral Buying account.

CROMWELL SIMON & COMPANY
By ORTON E. GOODWIN

Note: If cash purchase, we shall see that delivery of securities purchased is promptly made. [80]

EXHIBIT "Z."

CROMWELL SIMON & COMPANY
Mills Building
220 Montgomery Street
San Francisco

High Grade Investment Securities
All Standard Oil Stocks
Unlisted Stocks
Bonds

Telephone
Kearny 6940

April
Sixth
1925.

Mr. Ernest Hipp,
543 Monroe,
Santa Clara, Calif.

Dear Mr. Hipp:

Thank you very much for drawing our attention to the mistake in your certificate. So far as I know, this is the first one that has ever been made in this office and I hope it will be the last.

I appreciate very much indeed your drawing this matter to our attention and am sending you corrected certificate. Will you be good enough to return the other one to us by registered mail.

The oil markets are getting stronger every day and I look for a very marked upward price in your Standard. Pacific Oil this morning jumped nearly two points and we look for Standard Oil to follow very speedily.

It was reported also that the Studebaker Corporation plans to increase its dividend this year, which should also make that stock sell materially higher. In any event, I think Studebaker absurdly cheap at the present market.

Again assuring you of our appreciation, we are,

Very truly yours,

CROMWELL SIMON & COMPANY

ORTON E. GOODWIN

OEG—H. [81]

EXHIBIT "AA."

CROMWELL SIMON & COMPANY
Mills Building
220 Montgomery Street
San Francisco

High Grade Investment Securities
All Standard Oil Stocks
Unlisted Stocks
Bonds

Telephone
Kearny 6940

June 29th 1925.

Mr. Ernest Hipp,
543 Monroe St.,
Santa Clara, Calif.

Dear Mr. Hipp:—

We beg to acknowledge receipt of your payment of $361.68.

Enclosed you will find statement covering your account in full, as per your request, dated up to July 1, 1925.

Trusting you will find this perfectly in order, we are

Very truly yours,
CROMWELL SIMON & COMPANY
ORTON E. GOODWIN.

OEG:R. [82]

EXHIBIT "BB."

CROMWELL SIMON & COMPANY
Mills Building
220 Montgomery Street
San Francisco

High Grade Investment Securities
All Standard Oil Stocks
Unlisted Stocks
Bonds

Telephone
Kearny 6949

April
25th
1925.

Mrs. B. M. Ogier,
1696 Green Street,
San Francisco, Cal.

Dear Mrs. Ogier:—

We want to thank you for your partial payment account for 50 shares of Studebaker Corporation, certificate for which is sent you herewith. We already feel that you and Miss Oliver are old clients of our organization, and we assure you that every effort will be made to give the best attention possible to your account.

You may be assured at all times that you will have the very best attention possible and our sole interest will be to see that your account is handled in a manner that will be productive of profit to you.

Very truly yours,

CROMWELL SIMON & COMPANY

ORTON E. GOODWIN.

OEG:R. [83]

[Envelope.]

[Stamped]: San Francisco, Calif. Apr. 25, 4 P. M., 1925. Let's Go! Citizens Military Training Camps.

[Two Cents U. S. Postage Stamp Attached.]

MRS. B. M. OGIER,
1696 Green Street,
San Francisco, Calif.

[On Reverse Side:]

Return to
Suite —0 Mills Building
220 Montgomery Street
San Francisco, California

~~97.50~~
9

Hd	877.50	1000
Z	6.00	500
F	5.00	1
M	5.00	
	6.40	2600
	3,117.50	
	2,477.50 [84]	

EXHIBIT "CC."

CROMWELL SIMON & COMPANY
Mills Building
220 Montgomery Street
San Francisco

High Grade Investment Securities
All Standard Oil Stocks
Unlisted Stocks
Bonds

Telephone
Kearny 6940

June
13th
1925.

Mrs. B. M. Ogier,
1696 Green Street,
San Francisco, Calif.

Dear Mrs. Ogier:—

We beg to acknowledge, with much appreciation, receipt of five shares of Pacific Oil stock, which has been credited to your account as collateral.

Very truly yours,
CROMWELL SIMON & COMPANY
ORTON E. GOODWIN.

OEG:R. [85]

EXHIBIT "DD."

CHARLES WESLEY COMPANY
Edwards & Wildey Bldg.
Sixth St. and Grand Ave.
Los Angeles

High Grade Investment Securities
All Standard Oil Stocks — Bell Telephone
Unlisted Stocks. — Connections
Bonds

October
Ninth,
1925.

Miss Clara Oliver,
1696 Green St.,
San Francisco, California.

Dear Miss Oliver:—

Enclosed you will find check for $400.00. We are placing same against your account. As Mr. Parkes has been very busy it has been almost impossible to get your statement out to date, but I will forward same within the next day or two so that you can see just how your accounts stand.

I am taking care of the Dodge and Bond, as per our conversation.

Things here are coming along wonderfully well and everything points to a huge success, and I know that this information will make both yourself and Mrs. Ogier as happy as we are.

Jack wishes to be remembered to both yourself and Mrs. Ogier.

With my best wishes to you both, I am

Sincerely yours,

HARRY M. KASSMIR.

HMK:S.

We also entered & ordered Studebaker for you, will send Certificates along with your statement. [86]

EXHIBIT "EE."

CHARLES WESLEY COMPANY
Edwards & Wildey Bldg.
Sixth St. and Grand Ave.
Los Angeles

High Grade Investment Securities
All Standard Oil Stocks
Unlisted Stocks
Bonds
Bell Telephone
Connections

October 29, 1925.

Miss Clara Oliver,
1696 Green St.,
San Francisco, Calif.

Dear Miss Oliver:

This is to acknowledge receipt of your letter of October 24th and also advise that a check for dividends payable on the company's stock should be in your hands on Saturday of this week.

Due to the fact that all records of stock transactions are kept at the company office in Reno, it has

required quite some time to secure the necessary figures in order to pro rate the amounts of dividend checks.

Very shortly Harry will communicate with you, in all probability by telephone. Not knowing when he will be in San Francisco I cannot make a more definite statement. Please remember Harry and myself very kindly to Mr. Ogier and accept the best wishes of the organization for yourself.

Sincerely yours,
J. W. RANDOLPH.

JWR:BA. [87]

EXHIBIT "FF."

THOMAS ALLEN COMPANY
White-Henry-Stuart Building
Investment Securities
Seattle, Wash.

High Grade Investment Securities
All Standard Oil Stocks
Unlisted Stocks
Bonds

Telephone
Elliott 4520

March
15
1926

Miss Clara Oliver,
1696 Green St.,
San Francisco, Calif.

Dear Miss Oliver:

I know that you will pardon me for my neglect

in not writing and not sending you check as promised, but as things have been so that I have been unable to devote any time in the office I know you will overlook my neglect. I have been out of the city quite a good deal henceforth had to let matters of importance go.

I am enclosing check for $102.50 which are the dividends on the 10 Armour A, 5 Pacific Oil, 10 Foster & Kliser and 50 Dodge Preferred.

We are coming along and the volume of business is increasing daily, and I believe that our success here is almost an assured fact.

In reference to the dividends for the firm, I am writing Mr. Randolph at Los Angeles and will advise you on this later. With my best wishes to both Mrs. Ogier and yourself, I am as ever

Sincerely,

HARRY KASSMIR. [88]

EXHIBIT "GG."

THOMAS ALLEN COMPANY
White-Henry-Stuart Building
Investment Securities
Seattle, Wash.

High Grade Investment Securities
All Standard Oil Stocks
Unlisted Stocks
Bonds

Telephone
Elliott 4520

May
5
1926

Miss Clara Oliver,
1696 Green St.,
San Francisco, Cal.

Dear Miss Oliver:

Was indeed very glad to have received your letter of May 3rd., and was also glad that you received the check for $25.00.

In reference to the check for the interest from Los Angeles, if you do not receive this within the next few days let me know how much the amount is and I will send you a check for it.

Hope that both yourself and Mrs. Ogier are enjoying the best of health. With my best wishes to you both, I am

Very Sincerely Yours,
HARRY KASSMIR. [89]

EXHIBIT "HH."

CROMWELL SIMON & COMPANY.
Mills Building
220 Montgomery Street
San Francisco

High Grade Investment Securities
All Standard Oil Stocks
Unlisted Stocks
Bonds

Telephone
Kearny 6940

September
11th,
1925.

Mr. W. F. Allen,
1717 Ellis St.,
San Francisco

Dear Mr. Allen:—

We wish to thank you for your order for fifty shares of Studebaker Stock, and you will find enclosed our certificate covering this purchase.

In this connection, we acknowledge receipt of fifty shares of Fageol Motors, to apply as collateral on this account.

Will you please be good enough to check your Certificate of Purchase carefully, and advise us immediately in the event there is any item which is not entirely clear to you or does not meet with your satisfaction?

Trusting that we may again be of service to you in the near future, we are

Very truly yours,
CROMWELL SIMON & COMPANY
J. W. RANDOLPH.

JWR:R. [90]

EXHIBIT "II."

CROMWELL SIMON & COMPANY.
Mills Building
220 Montgomery Street
San Francisco

High Grade Investment Securities
All Standard Oil Stocks
Unlisted Stocks
Bonds

Telephone
Kearny 6940

September
16th,
1925.

Mr. W. F. Allen,
1717 Ellis St.,
San Francisco.

Dear Mr. Allen:—

Please find enclosed certificate covering your purchase of 200 shares of Shell Union Oil Stock.

In this connection we acknowledge receipt of 150 shares of Fageol Motors stock to be used as collateral on the above partial payment account.

Will you please make the usual check of this cer-

tificate, and advise us in the event of any discrepancy?

Assuring you that we are at your service at all times, and thanking you for the above purchase, we are

Very truly yours,
CROMWELL SIMON & COMPANY,
J. W. RANDOLPH.

JWR:R. [91]

EXHIBIT "JJ."

CHARLES WESLEY COMPANY,
Edwards & Wildey Bldg.
Sixth St. and Grand Ave.
Los Angeles.

High Grade Investment Securities
All Standard Oil Stocks — Bell Telephone
Unlisted Stocks — Connections
Bonds

November 4, 1925.

Mr. W. F. Allen,
1717 Ellis St.,
San Francisco, Calif.

Dear Mr. Allen:—

In reply to your letter of November 2nd, please be advised that the down payment on your purchase agreement for twenty-five shares of Dodge Brothers Class A Common Stock dated October 14th was taken care of as follows: Two shares of Liberty National Bank to be used as collateral

upon which we allowed $141.85, plus dividends due on Shell Union stock, amounting to $70.00, making a total as noted above.

Hoping this answers your questions and with a desire to be of further service to you we are—

Very truly yours,
CHARLES WESLEY COMPANY,
J. W. RANDOLPH,
General Manager.

JWR.
FCM. [92]

EXHIBIT "KK."

CHARLES WESLEY COMPANY,
Edwards & Wildey Bldg.
Sixth St. and Grand Ave.
Los Angeles.

High Grade Investment Securities
All Standard Oil Stocks — Bell Telephone
Unlisted Stocks — Connections
Bonds

October
Thirteenth,
1925.

Miss Mary Esther Durham,
5838 Birch Court,
Oakland, California.

Dear Miss Durham:—

Yesterday being a holiday, plus the fact that I had been somewhat indisposed due to having con-

tracted a cold when last in San Francisco, I delayed sending you a check to take care of the matter that is uppermost in your mind at this time.

Herewith please find check No. 2054, for $1500.00, made in your name. No doubt you will immediately deposit this with your bank, which is the proper thing to do, and if you will be good enough to take up the collateral, in the shape of Pacific Lumber Company stock, and send to me immediately I will appreciate it very much.

I hope you will please understand the great amount of work both Harry and I have had to take care of during the past thirty days and, therefore, make allowances for what, seemingly, was an unpardonable oversight.

It may be that our next trip to San Francisco will not be made for several days. In that event, please take time to write us.

With best wishes and kindest regards from Harry and myself.

Sincerely yours,
J. W. RANDOLPH.

JWR:S. [93]

EXHIBIT "LL."

CHARLES WESLEY COMPANY
Edwards & Wildey Bldg.
Sixth St. and Grand Ave.
Los Angeles

High Grade Investment Securities
All Standard Oil Stocks — Bell Telephone
Unlisted Stocks — Connections
Bonds

October 28, 1925.

Miss Mary Esther Durham,
5838 Birch Court,
Oakland, Calif.

Dear Miss Durham:

I know you will be very happy to learn that the expected company dividend check will be in your hands on Saturday of this week.

It is highly probable that Harry will be in the bay region within the next few days, so therefore you may expect a 'phone call.

The matter of taking up the loan secured by Pacific Lumber Company stock may be discussed thoroughly and to your satisfaction I am sure.

Our business is growing very rapidly and I hope you and Aunt Emily will be able to work out a plan so that my suggestion regarding your visiting this city will be acted upon before very many days.

With sincerest of good wishes to you and Aunt Emily and hoping to visit you real soon, I am

Very sincerely,
J. W. RANDOLPH.

JWR:BA. [94]

EXHIBIT "MM."

CHARLES WESLEY COMPANY
Edwards & Wildey Bldg.
Sixth St. and Grand Ave.
Los Angeles.

High Grade Investment Securities
All Standard Oil Stocks — Bell Telephone
Unlisted Stocks — Connections
Bonds

February 2, 1926.

Miss Mary Esther Durham,
5838 Birch Court,
Oakland, California.

My dear Miss Durham:

I am extremely sorry to learn, from your letter of January 30, that Mrs. Beans has been ill and I sincerely hope she will rapidly regain her normal health.

I am rather surprised to learn that the "all important" matter regarding a check has not been taken care of. It was my understanding that this, as well as other matters that have to do with affairs in the Bay region were being taken care of by Mr. Kassimir.

I will immediately communicate to him the important facts of your letter. In the meantime please remember me kindly to Mrs. Beans and accept my best wishes for yourself.

Yours sincerely,
J. W. RANDOLPH.

JWR:M. [95]

EXHIBIT "NN."

THOMAS ALLEN COMPANY
White-Henry-Stuart Building
Investment Securities
Seattle, Wash.

High Grade Investment Securities
All Standard Oil Stocks
Unlisted Stocks
Bonds

Telephone
Elliott 4520

February
19
1926

Miss Mary Esther Durham,
5838 Birch Court,
Oakland, California.

Dear Mary Esther:

To say that I was happy to hear from you and news about Aunt Emily would be using too mild a term.

You remember when I was over to see yourself and Aunt Emily I spoke to you that we had in mind opening up here in the North, and I am happy to

report to you that everything here is going along wonderfully well.

I did not understand at the time that we spoke about the $1500.00 that it would be a necessity to lift that loan at the bank, so I did not prepare myself for that reason, but if it is a case of necessity I will try to arrange to forward this $1500.00 on to you. I am enclosing check for $241.00 on account of dividends.

I am glad to hear that Aunt Emily is gaining and tell her not to worry so much because all is well that ends well. I can assure you that we are doing all possible so that we may all enjoy success.

In reference to the stock Certificates I still have them as I really was too busy to have the names changed properly, but will do so in the very near future and send them to you.

Just believe me when I say that I hope that both Aunt Emily and yourself will have nothing to worry about. I will keep you informed of all activities. With my best wishes and regards to both Aunt Emily and yourself, I am

Sincerely yours,
HARRY KASSMIR.

HMK:B.
encl.

[Envelope.]

Special Delivery.

[Stamped:] Seattle, Wash., Feb. 19, 5 P. M., 1926, Terminal Sta.

[Twelve Cents U. S. Postage Stamps Attached.]

MISS MARY ESTHER DURHAM,
5838 Birch Court,
Oakland, California. [96]

EXHIBIT "OO."

THOMAS ALLEN COMPANY
White-Henry-Stuart Building
Investment Securities
Seattle, Wash.

High Grade Investment Securities
All Standard Oil Stocks
Unlisted Stocks
Bonds

Telephone
Elliott 4520

March
15
1926

Miss Mary Esther Durham,
5838 Birch Court,
Oakland, Calif.

Dear Aunt Emily and Mary Esther,

You must pardon me for not answering your letter of March 7th immediately, but as I have been so busy and out of the city working I really have not had an opportunity to answer your letter the way that I wanted to.

I shall see that you have your dividends in your hands by April 5th and will do everything possible to see that you will not have to worry about your bank loan on May 17th.

I know how this loan has worried both Aunt Emily and yourself and feel that I am partly responsible for a good deal of the annoyance that was caused you.

I should say that you are not unreasonable in asking me anything you would like to know and I am only too glad to answer so that you may understand everything.

Business here is coming along as well as could be expected for a new organization, and I can assure you that we are working mighty hard, as you can realize, to make a success of OUR business. I do not see anything to worry about in the future as from all indications we are going to be a huge success.

I certainly hope that Aunt Emily is coming along and that by the time you receive this letter she has fully recovered from her last attack.

We have had some unfortunate happenings again in our family. My Dad was taken sick and they thought he had a tumor on his liver and he was sent to the Mayo Clinic at Rochester, but as they have diagnosed his trouble as gall stones I do not feel worried. My Mother is also bothered with her heart, so you can see we all have sickness but viewing it as Aunt Emily does I know everything will be all right.

Nothing else for today excepting my best wishes to yourself and Aunt Emily, I am

Sincerely yours,

HARRY M. KASSMIR.

[Envelope.]

Special Delivery.

[Stamped]: Seattle, Wash., Mar. 15, 7:30 P. M., 1926. Terminal Sta. Lets Go! Citizens' Military Training Camp.

[Two Cents U. S. Postage Stamp Attached.]

MISS MARY ESTHER DURHAM,
5838 Birch Court,
Oakland, Calif. [97]

EXHIBIT "PP."

CHARLES WESLEY COMPANY
Investment Securities
609 So. Grand Avenue
Los Angeles

Telephone
Trinity 1371
June 26, 1926.

Dear Mrs. Beans:

Have been anxiously waiting a reply to my letter of several days ago, which was in answer to yours of June 6th.

The last letter I had from Mr. Kassmir dated June 16th, stated he had received a letter from Miss Durham and he would reply to it immediately. Since then I've heard nothing.

Write me if you please and tell me all the news.

Kindest regards to you and Miss Durham.

Most sincerely,
J. W. RANDOLPH.

[Envelope.]

[Stamped]: Pasadena, Jun. 26, 3 P. M., 1926. Calif.

Charles Wesley Company
Investment Securities
609 So. Grand Avenue
Los Angeles

MRS. EMILY A. BEANS,
5838 Birch Court,
Oakland,
Calif. [98]

EXHIBIT "QQ."

THOMAS ALLEN COMPANY
White-Henry-Stuart Building
Investment Securities
Seattle, Wash.

High Grade Investment Securities
All Standard Oil Stocks
Unlisted Stocks
Bonds

Telephone
Elliott 4520

July
7
1926

Miss Mary Esther Durham,
5838 Birch Court
Oakland, Calif.

Dear Mary Esther:

I did not write you because I really expected to come to San Francisco for over the 4th, but I found

it was impossible for me to get away at this time. It really is with regret that I say this, but I hope that it wont be very long before I will be down to see both yourself and Aunt Emily and to look over the gladeolis that I know you have and are beautiful.

It certainly makes me feel happy to know that Aunt Emily is gaining and I hope it wont be long before she is back into the condition that I would like to see her in.

If you will send me a letter upon receipt of this and let me know just the amount of that dividend, I will send you a check immediately. Hope that both yourself and Aunt Emily are in the best of health and that you enjoyed a pleasant 4th of July. I am with my best wishes to you both, as ever

Sincerely yours,
HARRY KASSMIR.

[Envelope.]

[Stamped]: Seattle, Wash., Jul. 8, 9 A. M., 1926. Terminal Sta.

[Two Cents U. S. Postage Stamp Attached.]

MISS MARY ESTHER DURHAM
5838 Birch Court,
Oakland, Calif. [99]

EXHIBIT "RR."

Seattle, Wash.
March 8th, 1927.

Dear Mrs. Beans and Miss Durham:

I am enclosing a copy of letter that I am sending to Mr. Allen, the attorney that wrote me regarding your transaction.

I am extremely sorry that it was necessary for you to place this matter in the hands of an attorney. I know that both of you appreciate just how hard I have been trying to clear up the sad mess that Mr. Simon left in San Francisco for us all and you can believe me, I have had my hands full. I know that it will only be a matter of a short time before I will be able to take care of a part of the amount due you folks. I extremely regret the delay because of knowing the situation that you both are in, I can only say that I promise to do my level best to clear this up. I hope that you will look upon this matter so that you will withdraw it from the attorneys hands.

I can imagine the beautiful sunshine that you folks are enjoying in Oakland and can picture in my minds eye the beautiful flowers around your home, wish I was there to enjoy them. With the trials and tribulations that I have had the past year I certainly do wish that I was back South. I expect to make a trip to San Francisco in the very near future and you can bet I will call upon you when I get there.

With my kindest and best wishes to both of you, I am

Sincerely yours,
HARRY KASSMIR. [100]

EXHIBIT "SS."

Seattle, Wash.
March 8th, 1927.

Mr. John J. Allen, Jr., Atty.,
902 Syndicate Bldg.,
Oakland, Calif.

Dear Mr. Allen:

No doubt you received my telegram and wondered why you have not received this letter sooner but immediately upon sending you telegram I received a message calling me out of the city and did not return until this morning. I hope you will pardon the delay in answering.

Regarding Mrs. Beans and Miss Durham, it has been impossible for me to check up on the amount due them because all of these records were kept in San Francisco and as I intend making a trip to San Francisco very shortly I then will be able to check up the amount and will also call upon you so that we may be able to go into this matter thoroughly. Allow me to give you a brief history of the transaction between Mrs. Beans and Miss Durham and the firm of Cromwell Simon & Company.

Mrs. Beans and Miss Durham had entered into contract with the firm of Cromwell Simon & Company for the purchase of different stocks (I do not

remember the dates but will give them all to you later). Because of reputation that Mr. Simon had, unbeknown to me or to my associates there, the Corporation Department called Cromwell Simon & Company before them for a hearing and revoked their permit. Knowing that this firm was trying to operate legitimately, my associates and myself decided to take this matter into Superior Court. About the time of the hearing before Superior Court, Mr. Simon decided that it would be a good thing for him to skip out with all funds available, which he did.

Mr. Randolph and myself called upon Mrs. Beans and Miss Durham and explained the situation to them and as we have always felt and I feel at the present time that they are very dear friends and we did not want them to suffer any loss, this transaction was made a loan so that I could repay the amount due them.

I have been doing everything possible so that this matter can be settled and hope to be able to send a substantial amount to these folks within the very near future.

I know that if you will take this matter up with Mrs. Beans and Miss Durham they will look upon it this way as they understand all of the circumstances. Hoping to receive a favorable reply from you, I am

Sincerely yours, [101]

EXHIBIT "TT."

Seattle, Wash.
March 8th, 1927.

Mr. John J. Allen, Jr., Atty.,
902 Syndicate Bldg.,
Oakland, Calif.

Dear Mr. Allen:

No doubt you received my telegram and wondered why you have not received this letter sooner but immediately upon sending you telegram I received a message calling me out of the city and did not return until this morning. I hope you will pardon the delay in answering.

Regarding Mrs. Beans and Miss Durham, it has been impossible for me to check up on the amount due them because all of these records were kept in San Francisco and as I intend making a trip to San Francisco very shortly I then will be able to check up the amount and will also call upon you so that we may be able to go into this matter thoroughly. Allow me to give you a brief history of the transaction between Mrs. Beans and Miss Durham and the firm of Cromwell Simon & Company.

Mrs. Beans and Miss Durham had entered into contract with the firm of Cromwell Simon & Company for the purchase of different stocks (I do not remember the dates but will give them all to you later). Because of reputation that Mr. Simon had, unbeknown to me or to my associates there, the Corporation Department called Cromwell Simon

& Company before them for a hearing and revoked their permit. Knowing that this firm was trying to operate legitimately, my associates and myself decided to take this matter into Superior Court. About the time of the hearing before Superior Court, Mr. Simon decided that it would be a good thing for him to skip out with all funds available, which he did.

Mr. Randolph and myself called upon Mrs. Beans and Miss Durham and explained the situation to them and as we have always felt and I feel at the present time that they are very dear friends and we did not want them to suffer any loss, this transaction was made a loan so that I could repay the amount due them.

I have been doing everything possible so that this matter can be settled and hope to be able to send a substantial amount to these folks within the very near future.

I know that if you will take this matter up with Mrs. Beans and Miss Durham they will look upon it this way as they understand all of the circumstances. Hoping to receive a favorable reply from you, I am

Sincerely yours,

H. M. KASSMIR.

[Envelope.]

Special Delivery

[Twelve Cents U. S. Postage Stamp Attached.]

[Stamped:] Seattle, Wash. Mar. 8, 3 P. M., 1927. Terminal Sta. Let's Go! Citizens' Military Training Camps.

MR. JOHN J. ALLEN, Jr.,
Attorney at Law,
902 Syndicate Bldg.,
Oakland, Calif. [102]

EXHIBIT "UU."

High Grade Investment Securities
All Standard Oil Stocks Telephone
Bonds Kearny 6940

CROMWELL SIMON & CO.
Suite 212—Mills Building
220 Montgomery Street
San Francisco

The Romance of Studebaker

Do you realize that the stock of the Studebaker Corporation is now paying dividends that yield 9% a year—$1.00 a share every three months. Do you realize its earnings last year were over $7.00 a share and they are now running at the rate of $11.00 a share for 1925. This indicates increased dividends and a much higher price for the stock.

ADVANCED FROM $34 TO $151 PREVIOUSLY

The market character of Studebaker Corporation stock is fairly indicated by the advance of the so-called "old" stock (prior to the big stock divi-

dends) from $34 to $151 per share in the last great bull market—1918 to 1919. It is as big an opportunity below $50 today as it was at $34 a few years ago, considering the greatly added values through the millions of dollars of earnings "plowed back" to the corporation. Its sales and profits are increasing by leaps and bounds and every factor that caused the old stock to advance is in progress again.

WONDERFUL DIVIDENDS

Throughout the entire career of Studebaker and particularly during the past 50 years, it has distributed enormous cash and stock dividends. Since the incorporation of the motor corporation in 1911, *it has paid over $70 per share in cash dividends and another 58% in stock dividends.* The stock dividends were far more valuable than the cash.

BE A PARTNER

Many persons have purchased shares in new automobile companies. Why not be a partner in one of the oldest and strongest of them all? There are few concerns in this country 73 years in business continuously, in which it is possible to buy an interest at anything like a reasonable price. Buy shares in Studebaker. Be a partner in this great enterprise.

INVESTMENT IS SAFE

Everyone knows that Studebaker is one of the greatest motor companies of the world. Hence it is a fine, safe investment. The stock is listed on the New York Stock Exchange and you can find out its value any day simply by looking at your daily

paper. Act at once, as Studebaker is rising, due to enormous increase in announced profits, as a result of greater sales for 1925.

It is interesting to figure the present value of an original 100 shares Studebaker traded in on the Exchange; $3,675 for 100 shares in 1912 would have been increased to $10,065 by subscriptions to stock offered in 1914 and 1920, while the original 100 shares would have increased to 270 by these subscriptions, as well as stock dividends of 33 1/3% in 1920, and 25% in 1922. The owner has also received continuous dividends from 1915, totaling $69.50 a share, and representing a cash value in excess of $10,000 on his holdings. In other words, during twelve years, the original investment has more than trebled in value.

Can you afford to overlook this opportunity?

POST CARD.

[Two Cents U. S. Postage Stamp Attached.]
This Card is
already
signed
for your
convenience
Mail it
To-day!

CROMWELL SIMON & COMPANY
220 Montgomery Street
San Francisco
California. [103]

EXHIBIT "VV."

I should like to have complete information regarding the dividends and investment possibilities of

THE STUDEBAKER CORPORATION

Send me your report and full information how I can buy this stock.

This card
will bring
full details
without
obligation
on your part

PHIL A. NAGAN
3126 Clay
City

[Envelope.]

[Stamped]: San Francisco, Calif., May 16, 1:30 P. M., 1925. Let's go! Citizens Military Training Camps.

Let's go! Citizens Military Training Camps.

[One Cent U. S. Postage Stamp Attached.]

Is your
money
bringing
with safety
9% [104]

EXHIBIT "WW."

SAMUEL H. ROBINSON
Attorney at Law
Hobart Building
San Francisco, California.

July 25, 1925.

Mr. Leroy F. Pike,
City Attorney,
Reno, Nevada.
Re: Cromwell & Company, Inc.

Dear Mr. Pike:—

I am enclosing original and two copies of the articles of incorporation of Cromwell & Company, Inc.—the name which we have decided upon for the business now being conducted as Cromwell Simon Company, and also our check in the sum of Two Hundred Dollars, for necessary filing expenses, fees, etc. I would appreciate your looking through the articles to determine whether they are in good form in your opinion, and filing them, and immediately sending to me copies certified by the Secretary of State.

Will you please provide for the three dummies, and I will write you later as to what should be done in reference to the holding of meetings and the passage of resolutions.

Mr. Kassmir is going to subscribe for a large block of the preferred stock, and the probabilities are that the common shares will be issued for services.

Please send me also an itemized statement from the Secretary of State, showing what the disbursements to him were, so that I may be informed what the fees are for my future guidance. In the event that any additional moneys are required in excess of the check enclosed please expend the money from your own funds and I will guarantee that you will be reimbursed. Also advise me what your fees in reference to the matter are.

You will note that we have decided to have the resident agent in our own Reno office, which, I think, is the most practical way of handling the situation in as much as we are actively doing business there. In the event you desire any further information or advice do not hesitate to wire or phone me at my expense.

Let me recall to you your promise that you would give me the address of the lady who owned the prospective hotel site in Reno. I would appreciate your letting me know this immediately so that if we are to see her we can call upon her before our next trip to Reno.

Mr. Kassmir and myself appreciate very much your hospitality, and hope to be able to reciprocate upon your next [105]

EXHIBIT "XX."

L. F. P. 7/25/25 Page 2.
visit here.

I am not unmindful of my promise that a certain vintage would be reserved for you. It is probable

that we shall call upon you the latter part of next week, probably about Friday or Saturday, which will be July 31st or August 1st.

Yours cordially,
SAMUEL H. ROBINSON.

SHR:FN
Encs. [106]

EXHIBIT "YY."

SAMUEL H. ROBINSON
Attorney at Law
Hobart Building
San Francisco

August
twenty-sixth
1925.

LeRoy F. Pike, Esq.,
Attorney-at-law,
City Hall,
Reno, Nevada.

Dear Sir:

This will tardily acknowledge your letter accompanying the minutes of Cromwell & Company and Cary & Company, which are made out in very good shape. Will you please arrange to have the following certificates made out:

First: Issue certificates representing 2,000 shares of prefered and 500 shares of common capital stock of Cromwell & Company to Harry M. Kassmir;

Second: Transfer on your records the following shares and to the following individuals from the ~~above certificates: 140 shares of the preferred and~~ 35 shares of the common, to Mrs. B. M. Ogier and ~~Clara Oliver, as joint owners with right of survivorship;~~

Third: Transfer the following shares to the following individuals from the certificates designated in paragraph "First": ~~40 shares preferred~~ and 10 shares of common to Clara Oliver;

Fourth: Transfer the following shares to the individuals named from the certificates designated in paragraph "First" issued to Harry M. Kassmir, ~~160 shares preferred, 40 shares common to Emily A. Beans;~~

Fifth: Transfer the following shares to the following individuals from the certificates originally ~~issued under paragraph "First," 274 shares preferred and~~ 269 common to Emily A. Beans and Esther Mary Durham as joint owners with right of survivorship. [107]

EXHIBIT "ZZ."

LeRoy F. Pike, Esq. 8-26-25 Page 2

Will you please issue these certificates and mail them down to this office at your earliest convenience.

Very truly yours,
SAMUEL H. ROBINSON.

Kearny 4357.
SHR:MC.

Pg—1378 Fed. Code—

Original issue 2000 shares preferred at $25.00= $50,000 at 5¢=$25.00 tax.

500 shares common no par at 5¢ per share=$25.00

Transfer issue.

3500 at 2¢=	70¢
140 pref, at $25=	"
35 shares common—no par	70¢
40 " pref.—at 25—at 2=	20¢
10 " common—no par at 2=	20¢
160 pref.—at 25¢=at 2—	80¢
40 shares common	80¢
274—pref.—	136
269—common—	5.38

[108]

EXHIBIT "AAA."

SAMUEL H. ROBINSON
Attorney at Law
Hobart Building
San Francisco

August
thirty-first
1925.

Leroy F. Pike, Esq.,
Attorney-at-law,
Reno, Nevada.

Dear Mr. Pike:

In re CROMWELL, INC.

Several days ago I wrote you asking you to issue various certificates in accordance with the instructions contained in my letter. My client has been besieging me continuously since then because he in turn has been importuned for delivery of the certificates. I would appreciate your doing what you can to expedite this matter.

Will you please take care of the affixing of revenue stamps to the original certificates, also the transfers. I need hardly say that with reference to this expense as well as all expenses, that I leave all disbursements to your own good judgment, and you may be assured that they will be met upon the rendering of an account by you.

By the way, several of us reserved a certain Monday evening for you because we expected you to be with us on that occasion, and we were much disap-

pointed because you failed to get in touch with us. Won't you let me know when you are coming next to San Francisco.

In appreciation of your good offices, I am,

Cordially yours,

SAMUEL H. ROBINSON.

Kearny 4357.

SHR:MC. [109]

EXHIBIT "BBB."

SAMUEL H. ROBINSON, Esq.
Attorney at Law
Hobart Building
San Francisco, Calif.

September
eighteenth
1925

LeRoy F. Pike, Esq.,
Attorney-at-law,
City Hall,
Reno, Nevada.

In re CROMWELL & COMPANY, INC.

Dear Mr. Pike:

I am enclosing Certificates Nos. 3 and 5 of the preferred, and Nos. 54 and 55 of the common shares in the above Company, heretofore issued, for cancellation because there was an error on my part in the instructions to you.

Please issue in their place two certificates:—one representing ~~482~~ ~~shares~~ ~~of~~ ~~preferred,~~ ~~and~~ ~~the~~ ~~other~~

representing 121 shares of the common, making both of them out to Emily A. Beans and Mary Esther Durham, as joint owners with right of survivorship. I believe that no revenue stamps are necessary on these, because they are merely to replace certificates issued erroneously and do not in any sense constitute a transfer.

I appreciate very much your wire with reference to my brief case and your speed in sending it on to me.

I am also in receipt of the two compressed sawdust blocks which have been on my desk the last couple of days and which have been examined by a number of people. What it's commercial possibilities are I have not yet been able to determine, but I am advised by one engineer that one of the difficulties to be met in marketing a product of that kind as fuel, is in securing an advantageous classification and rate from the carriers. The railroads are themselves interested in fuel deposits and might look upon your briquet as a competitive product. It has been stated to me that this was one of the difficulties encountered in marketing the coat briquets manufactured formerly by Los Angeles Gas & Electric Company, I am

Yours very truly,

SAMUEL H. ROBINSON

SHR:MC.

LFP:AP. [110]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 10th day of March, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable A. F. ST. SURE, Judge.

[Title of Cause.]

MINUTES OF COURT—MARCH 10, 1928—ARRAIGNMENT, ETC.

The defendants Samuel H. Robinson and J. W. Randolph were present with H. H. Harris, Esq., their attorney, and the defendant Orton E. Goodwin was present with John A. McGee, Esq., his attorney. On motion of J. L. Sweeney, Esq., Asst. U. S. Atty., the defendants were arraigned, stated their true names to be as contained in indictment, and waived reading of said indictment. On motion of attorneys for said defendants, it is ordered that this case be continued to March 26, 1928, to plead. On motion of attorneys for the defendants, and upon filing the consent of the Surety Company on the bonds of said defendants, IT IS ORDERED that said defendants Samuel H. Robinson, J. W. Randolph and Orton E. Goodwin be and are hereby permitted to leave the jurisdiction of this court until March 26, 1928, in accordance with an order this day signed and filed.

Case continued to March 26, 1928, for entry of plea of defendant Harry M. Kassmir. [111]

[Title of Court and Cause.]

DEMURRER OF DEFENDANT SAMUEL H. ROBINSON.

Comes now the defendant, Samuel H. Robinson, and demurs to the indictment heretofore presented and on file herein, and to each and every count thereof on the following grounds, to wit:

I.

That said indictment does not, nor any count thereof, state facts sufficient to constitute a public offense against the United States of America.

II.

That the indictment and each and every count thereof fails to advise the defendant herein sufficiently of the charge or charges that he is called upon to meet and does not contain averments sufficient to enable him to intelligently prepare for his trial and that in said behalf, each count thereof is ambiguous, unintelligible and insufficient in the following particulars:

1. That the paragraph beginning at line 12 and page 1 of said indictment herein, is unintelligible, ambiguous and meaningless and that the meaning intended to be conveyed thereby cannot be ascertained therefrom. [112]

2. That with reference to the paragraph beginning on line 29 and page 1 of said indictment, it

cannot be ascertained therefrom what part or connection, if any, the defendant, Samuel H. Robinson, had with said scheme or in what way he devised or intended by means of the allegations thereof to take part in said scheme to defraud.

3. That with further reference to said last-mentioned paragraph in said indictment, it cannot be ascertained therefrom whether the acts specified therein were actually performed.

4. That the paragraph beginning with line 21 of page 2 of said indictment is uncertain and ambiguous in that it cannot be ascertained therefrom, —(a) What relation, if any, Cromwell & Company, Inc., had to the alleged scheme or device, (b) Whether the said Samuel H. Robinson did in fact mail said Articles of Incorporation to LeRoy F. Pike at Reno, Nevada. (c) Whether said Robinson did request said Pike to obtain dummy directors. (d) In what manner said acts were unlawful or in violation of the statutes of the United States or any state or territory thereof. (e) What relation, if any, the said acts had to said alleged scheme or artifice to defraud.

5. With relation to paragraphs beginning on line 5 and ending on line 12 of page 3 of said indictment, it does not appear and cannot be ascertained therefrom,—(a) Whether it was part of the scheme or artifice to defraud that defendant, Kassmir, should offer to subscribe or should pay the sum of Fifty Thousand ($50,000.00) Dollars cash for said stock, or whether he should pay the said Fifty Thousand ($50,000.00) Dollars. (b) That

the falsifying or negativing paragraph thereof does not allege that the said Kassmir did not [113] offer to subscribe, (c) That said negativing paragraph states, "as defendant then and there well knew," but does not state which defendant then and there well knew that Kassmir did not pay Fifty Thousand ($50,000.00) Dollars cash. (d) That it cannot be ascertained therefrom who seconded, offered and/or passed said resolution, that is to say whether it was Cromwell, Simon and Company, Cromwell and Company or some other board, body or organization, or what relation said resolution had to said scheme or artifice. (e) That generally it cannot be ascertained in what manner said acts were a part of or in furtherance of said scheme or artifice to defraud.

6. With relation to paragraph beginning on line 13 and ending on line 27 of page 3 of said indictment, it cannot be ascertained therefrom, nor from any part of said indictment, (a) What is meant or intended to be meant by "Cromwell Simon and Co. Investment Plan," (b) What false and fraudulent representations or promises were made or intended to be made.

That the statements made therein are recitals of conclusions of law only and not allegations of fact.

7. With relation to paragraph beginning on line 5 of page 4, it cannot be ascertained therefrom nor from any part of said indictment, what false representations were to be used to induce and/or persuade the victims to purchase high-grade stock under the alleged Cromwell & Simon Co. Investment

Plan,—(a) What the Cromwell & Simon Co. Investment Plan was.

8. With relation to paragraph beginning on line 14 and ending on line 22 of page 4 of said indictment, it cannot be ascertained therefrom nor from any part of said indictment,— [114] (a) What time is referred to by the words "existing conditions." (b) What is meant by the language, "alluring, exaggerated, misleading, false and fraudulent representations," *that to* say what the alluring, exaggerated, misleading false and fraudulent representations related to. (c) What the language, "should raise in said victims hopes and expectations of profit and reward far beyond the limits warranted by existing conditions" relates to, or what connection same had, if any, with said artifice or scheme to defraud.

9. With relation to paragraphs beginning with line 24 and ending with line 31 of page 4, it cannot be ascertained therefrom nor from any part of the said indictment,—(a) In what respect it is alleged that Cromwell Simon & Co. was a reputable company, that is to say, reputed for what. (b) That the negativing and falsifying clause does not deny or allege that Cromwell Simon & Co. was a reputable brokerage company. (c) That it cannot be ascertained what is meant by "of the character of a bucket shop." (d) That the allegations in said paragraph as to representations were only representations of opinion and "puffing" permitted by law.

10. With reference to the paragraph beginning

on line 1 and ending on line 7 of page 5 of said indictment, it cannot be ascertained whether in truth or in fact it was or was not the business of Cromwell Simon & Co. to sell to alleged victims high-grade corporation stocks and other securities, particularly on the partial payment plan.

11. With relation to paragraph 3 on page 5 of said indictment, it cannot be ascertained therefrom, nor from any part of said indictment what is meant by,—(a) Cromwell Simon & Co. Investment Plan. [115]

12. With relation to paragraph 4 on page 5 of said indictment, it cannot be ascertained therefrom nor from any part of said indictment when or in what manner the alleged victims would draw any dividends or interest declared on high-grade stock or other securities so purchased and held by them, that is to say, said victims, or in what manner, if at all, this defendant would or could become possessed of said dividends or interest, or any of said defendants or in what manner said Cromwell Simon & Co. could or would become possessed of said dividends or interest thereon.

13. With relation to paragraph 5 appearing on page 6 of said indictment, it cannot be ascertained therefrom, nor from any part of said indictment what relation the following words, to wit: "that an investor subscribing for such corporate stock, or other securities, through the said company, would have the privilege of selling the same at any time he desired" would have as to the alleged scheme or artifice to defraud in this, that it is not

negatived or falsified that said investors referred to in said indictment had such privilege.

14. That Count 1 of said indictment does not state facts sufficient to constitute an offense against the United States of America; that said count does not allege that the letter set forth in said count was ever placed or caused to be placed in the United States mail.

15. That with respect to the letters referred to in each and all of the counts of said indictment, only the following are purported to be signed by or referred to the said defendant, Samuel H. Robinson: The letter referred to in [116] Count Eleven and marked Exhibit "S," the letters referred to in Count Thirty-five and marked "WW" and "XX," the letters referred to in Count Thirty-six and marked "YY" and "ZZ," the letter referred to in Count Thirty-seven and marked "AAA" and the letter referred to in Count Thirty-eight and marked "BBB," and it does not appear in the said indictment or any of the counts thereof what connection, if any, said Samuel H. Robinson had with the mailing of each and all of the exhibits referred to in this indictment and all of the various counts thereof.

SAMUEL H. ROBINSON,
Defendant.

H. H. HARRIS,
Attorney for Samuel H. Robinson.

[Endorsed]: Filed Mar. 26, 1928. [117]

[Title of Court and Cause.]

DEMURRER OF DEFENDANT J. W. RANDOLPH.

Comes now the defendant, J. W. Randolph, and demurs to the indictment heretofore presented and on file herein, and to each and every count thereof on the following grounds, to wit:

I.

That said indictment does not, nor any count thereof, state facts sufficient to constitute a public offense against the United States of America.

II.

That the indictment and each and every count thereof fails to advise the defendant herein sufficiently of the charge or charges that he is called upon to meet and does not contain averments sufficient to enable him to intelligently prepare for his trial and that in said behalf, each count thereof is ambiguous, unintelligible and insufficient in the following particulars:

1. That the paragraph beginning at line 12 and page 1 of said indictment herein, is unintelligible, ambiguous and meaningless and that the meaning intended to be conveyed thereby cannot be ascertained therefrom. [118]

2. That with reference to the paragraph beginning on line 29 and page 1 of said indictment, it cannot be ascertained therefrom what part or connection, if any, the defendant, J. W. Randolph,

had with said scheme or in what way he devised or intended by means of the allegations thereof to take part in said scheme to defraud.

3. That with further reference to said last mentioned paragraph in said indictment, it cannot be ascertained therefrom whether the acts specified therein were actually performed.

4. That the paragraph beginning with line 21 of page 2 of said indictment is uncertain and ambiguous in that it cannot be ascertained therefrom, —(a) What relation, if any, Cromwell & Company, Inc., had to the alleged scheme or device. (b) whether the said Samuel H. Robinson did in fact mail said Articles of Incorporation to LeRoy F. Pike at Reno, Nevada. (c) Whether said Robinson did request said Pike to obtain dummy directors. (d) In what manner said acts were unlawful or in violation of the Statutes of the United States or any state or territory thereof. (e) What relation, if any, the said acts had to said alleged scheme or artifice to defraud.

5. With relation to paragraphs beginning on line 3 and ending on line 12 of page 3 of said indictment, it does not appear and cannot be ascertained therefrom,—(a) Whether it was part of the scheme or artifice to defraud that defendant, Kassmir, should offer to subscribe or should pay the sum of Fifty Thousand ($50,000.00) Dollars cash for said stock, or whether he should pay the said Fifty Thousand ($50,000.00) Dollars. (b) That the falsifying or negativing [119] paragraph thereof does not allege that the said Kassmir did not offer to sub-

scribe. (c) That said negativing paragraph states, "as defendant then and there well knew," but does not state which defendant then and there well knew that Kassmir did not pay Fifty Thousand ($50,-000.00) Dollars cash. (d) That it cannot be ascertained therefrom who seconded, offered and/or passed said resolution, that is to say whether it was Cromwell, Simon and Company, Cromwell and Company or some other board, body or organization, or what relation said resolution had to said scheme or artifice. (e) That generally it cannot be ascertained in what manner said acts were a part of or in furtherance of said scheme or artifice to defraud.

6. With relation to paragraph beginning on line 13 and ending on line 27 of page 3 of said indictment, it cannot be ascertained therefrom, nor from any part of said indictment,—(a) What is meant or intended to be meant by "Cromwell Simon and Co. Investment Plan,"—(b) What false and fraudulent representations or promises were made or intended to be made.

That the statements made therein are recitals of conclusions of law only and not allegations of fact.

7. With relation to paragraph beginning on line 5 of page 4, it cannot be ascertained therefrom nor from any part of said indictment, what false representations were to be used to induce and/or persuade the victims to purchase high-grade stock under the alleged Cromwell & Simon Co. Invest-

ment Plan,—(a) What the Cromwell & Simon Co. Investment Plan was.

8. With relation to paragraph beginning on line 14 and ending on line 22 of page 4 of said indictment, it cannot be ascertained therefrom nor from any part of said indictment,— [120] (a) What time is referred to by the words "existing conditions," (b) What is meant by the language, "alluring, exaggerated, misleading, false and fraudulent representations," that is to say what the alluring, exaggerated, misleading, false and fraudulent representations related to. (c) What the language, "should raise in said victims hopes and expectations of profit and reward far beyond the limits warranted by existing conditions" relates to, or what connections same had, if any, with said artifice or scheme to defraud.

9. With relation to paragraphs beginning with line 24 and ending with line 31 of page 4, it cannot be ascertained therefrom nor from any part of the said indictment,—(a) In what respect it is alleged that Cromwell Simon & Co. was a reputable company, that is to say, reputed for what. (b) That the negativing and falsifying clause does not deny or allege that Cromwell Simon & Co. was a reputable brokerage company. (c) That it cannot be ascertained what is meant by "of the character of a bucket shop." (d) That the allegations in said paragraph as to representations were only representations of opinion and "puffing" permitted by law.

10. With reference to the paragraph beginning

on line 1 and ending on line 7 of page 5 of said indictment, it cannot be ascertained whether in truth or in fact it was or was not the business of Cromwell Simon & Co. to sell to alleged victims high-grade corporation stocks and other securities, particularly on the partial payment plan.

11. With relation to paragraph 3 on page 5 of said indictment, it cannot be ascertained therefrom nor from any [121] part of said indictment what is meant by,—(a) Cromwell Simon & Co. Investment Plan.

12. With relation to paragraph 4 on page 5 of said indictment, it cannot be ascertained therefrom nor from any part of said indictment when or in what manner the alleged victims would draw any dividends or interest declared on high-grade stock or other securities so purchased and held by them, that is to say, said victims, or in what manner, if at all this defendant would or could become possessed of said dividends or interest, or any of said defendants or in what manner said Cromwell Simon & Co. could or would become possessed of said dividends or interest thereon.

13. With relation to paragraph 5 appearing on page 6 of said indictment, it cannot be ascertained therefrom nor from any part of said indictment what relation the following words, to wit: "that an investor subscribing for such corporate stock, or other security, through the said company, would have the privilege of selling the same at any time he desired," would have as to the alleged scheme or artifice to defraud in this that it is not negatived

or falsified that said investors referred to in said indictment had such privilege.

14. That Count 1 of said indictment does not state facts sufficient to constitute an offense against the United States of America; that said count does not allege that the letter set forth in said count was ever placed or caused to be placed in the United States mail.

15. That with respect to the letters referred to in each and all of the counts of said indictment, only the following are purported to be signed by or referred to the said defendant, J. W. Randolph: The letter referred to in Count [122] Three and marked Exhibit "F," the letter referred to in Count Eleven and marked Exhibit "P," the letter referred to in Count Nineteen and market Exhibit "EE," the letter referred to in Count Twenty-two and marked Exhibit "HH," the letter referred to in Count Twenty-three and marked Exhibit "II," the letter referred to in Count Twenty-four and marked Exhibit "JJ," the letter referred to in Count Twenty-four and marked Exhibit "KK," the letter referred to in Count Twenty-five and marked Exhibit "LL," the letter referred to in Count Twenty-seven and marked Exhibit "MM" and the letter referred to in Count Thirty and marked Exhibit "PP," and it does not appear in the said indictment or any of the counts thereof what connection, if any, said J. W. Randolph had with the mailing of each and all of the exhibits referred to in

this indictment and all of the various counts thereof.

J. W. RANDOLPH,
Defendant.

H. H. HARRIS,
Attorney for J. W. Randolph.

[Endorsed]: Filed Mar. 26, 1928. [123]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 26th day of March, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable A. F. ST. SURE, Judge.

[Title of Cause.]

MINUTES OF COURT—MARCH 26, 1928—ORDER OVERRULING DEMURRERS, ETC.

The defendants Harry M. Kassmir, Samuel H. Robinson, J. W. Randolph and Orton E. Goodwin were present in court with their respective attorneys. The defendants filed demurrers to the indictment and a motion to quash indictment. After argument, IT IS ORDERED that said demurrers and said motion be and same are hereby submitted. Thereupon the defendants Harry M. Kassmir, Samuel H. Robinson, J. W. Randolph and Orton E. Goodwin each plead "Not Guilty" to the indictment

filed herein against them. ORDERED case be set for May 29, 1928, for trial.

The demurrers of the defendants Harry M. Kassmir, Samuel H. Robinson, Orton E. Goodwin and J. W. Randolph, and the motion of the defendant Orton E. Goodwin to quash indictment, heretofore heard and submitted, and the demurrers having been confessed as to the first count of the indictment, it is ordered that said demurrers be and the same are hereby sustained as to the first count of the indictment and that said demurrers be and the same are hereby overruled as to all other counts of the indictment herein, and that the motion of said Orton E. Goodwin to quash indictment be and the same is hereby denied. [124]

[Title of Court and Cause.]

PETITION FOR SEVERANCE (SAMUEL H. ROBINSON).

Now comes the defendant, Samuel H. Robinson, by his attorney, H. H. Harris, and respectfully prays the above-entitled court that he be tried separate and apart from the other defendants and that there be a severance as between him, as a defendant, and the other defendants, in the said entitled court and for ground of severance alleges as follows:

I.

That there is certain evidence necessary and material in his defense, which as to certain of the other defendants, particularly Harry M. Kassmir and

Cromwell Simon, would be inadmissible by reason of their privileged nature.

II.

That there is certain evidence material and necessary in his defense that would be inadmissible against any of the other defendants, particularly Harry M. Kassmir and Cromwell Simon, by reason of the fact that the introduction of those said facts on his behalf would be inadmissible over the objection of the other defendants on the ground that they [125] would thereby be compelled to testify against themselves without their consent.

III.

That the defense of Samuel H. Robinson is antagonistic to the defense of the other defendants in said cause.

IV.

That the defense of Samuel H. Robinson would implicate certain of the other defendants, particularly Harry M. Kassmir and Cromwell Simon.

V.

That the defense of Samuel H. Robinson cannot be presented fairly and properly in a joint trial with the other defendants and that the introduction of certain evidence pertaining to other defendants that would be as to him incompetent and immaterial, would seriously prejudice him.

H. H. HARRIS,
Attorney for Petitioner.

[Endorsed]: Filed May 8, 1928. [126]

[Title of Court and Cause.]

AFFIDAVIT OF SAMUEL H. ROBINSON FOR SEVERANCE.

State of California,
County of Los Angeles,—ss.

Samuel H. Robinson, being first duly sworn, deposes and says:

That he is one of the defendants in the above-entitled action. That the date of the trial of the above-entitled cause has been set for May 29, 1928. That there are four other defendants; that unless this Court grants the petition of this affiant to have his trial severed from the trial of the other four defendants, he will be tried on said date, jointly with the other four defendants.

Your affiant is an attorney at law, duly licensed and admitted to practice in all of the courts of the State of California, and has been such for more than seven years last past. That he is charged jointly with four other defendants in thirty-eight counts in this indictment of having used the mails to defraud. Affiant states that his only relation with the other defendants was that of attorney and client; that of the thirty-eight letters upon which the thirty-eight counts of the indictment are predicated, only five have been [127] mailed or caused to be mailed by him. That these letters were sent out by him in the regular course of business and as part of his professional employment as attorney for certain of the other defendants; that

he never had any acquaintance with the other defendants, nor had any part in the scheme set out in the indictment, prior to June, 1925; that said indictment contains various letters alleged to have been sent out prior to that date. That for the purpose of his defense, it will be necessary for him to introduce a number of letters and documents passing between the defendants, Harry M. Kassmir, Cromwell Simon and your affiant. That in addition to these letters, there were numerous oral communications and that said letters, documents and oral communications were occasioned solely by the relations between the said defendants, Harry M. Kassmir, Cromwell Simon and your affiant, by reason of the relation of attorney and clients; that these communications are therefore privileged and therefore inadmissible and that an objection to their introduction will be made by at least one of the defendants jointly charged with affiant. That these letters, documents and communications are absolutely necessary in the defense of your affiant; that his inability to introduce them would result as to him in a serious miscarriage of justice and a prejudice of his rights.

That in order to introduce evidence necessary in his own defense, affiant expects and intends to take the stand on his own behalf and his evidence will implicate certain of the other defendants and his defense is antagonistic to them. [128]

WHEREFORE, your affiant prays an order of

this court severing his trial from the trial of the other defendants.

SAMUEL H. ROBINSON,
Affiant.

Subscribed and sworn to before me this 7th day of May, 1928.

[Seal] VIVIAN M. HOOPS,
Notary Public in and for said County and State.

My commission expires February 10, 1930.

[Endorsed]: Filed May 8, 1928. [129]

[Title of Court and Cause.]

MOTION OF J. W. RANDOLPH AND SAMUEL H. ROBINSON FOR BILL OF PARTICULARS.

Now come J. W. Randolph and Samuel H. Robinson, by their attorney, H. H. Harris, and move the above-entitled court for an order directing the United States District Court for the Northern District of California, Southern Division, to furnish to said defendants a bill of particulars in order that said defendants may know and be particularly informed of the following matters, to wit:

(1) The names of the persons referred to in said indictment as victims.

(2) What particular certain class of persons the defendants had devised a scheme and artifice to defraud?

(3) When or during what period prior to the

mailing of the letters stated did defendants devise or intend to devise the scheme to defraud alleged in the indictment?

(4) The names and addresses of the persons to whom and the times and places when the defendants Cromwell Simon and Harry M. Kassmir as copartners or otherwise offered for sale or negotiated for the sale of or otherwise dealt in securities in the State of California. [130]

(5) Whether or not the defendant, Robinson, ever requested said Pike to obtain dummy directors and regularly incorporate Cromwell & Company, Inc., under the laws of the State of Nevada and if so when the said Pike did said things, and the names and addresses of said dummy directors.

(6) Whether or not Samuel H. Robinson, Harry M. Kassmir and Cromwell Simon ever visited Reno, Nevada, for the purpose of obtaining a meeting of the directors of Cromwell & Company, Inc., and if so the time when said visits occurred and the time when said meeting of said directors occurred.

(6a) What relation, if any, the formation and/or existence of Cromwell & Company, Inc., had or could have had to the alleged scheme or device.

(7) Whether or not the defendant, Kassmir, ever offered to subscribe $50,000.00 of said company's stock and pay cash for it and if so the time and place when said offer was made.

(8) Who put the offer of Harry M. Kassmir to subscribe $50,000.00 worth of stock in the form of a resolution and who seconded said resolution and

were the persons who voted and passed the same unanimously.

(9) Whether or not the offer of Harry Kassmir to subscribe $50,000.00 worth of said company's stock was ever accepted by said company and if so the time and place when said acceptance occurred.

(10) What were the terms and conditions of the so-called Simon & Company investment plan.

(11) Whether or not the defendants J. W. Randolph or Samuel H. Robinson ever solicited or procured from the so-called victims subscriptions or orders for shares of corporate stock or other securities and if so the names [131] and addresses of said alleged victims and the time and place of said soliciting or procuring said subscriptions.

(12) What false or fraudulent representations or promises as to the financial standing of the Cromwell Simon & Company or of the defendant, Cromwell Simon, or Harry M. Kassmir were ever made by the defendants J. W. Randolph and Samuel H. Robinson.

(13) To what persons and at what time or place *were* any false or fraudulent representations or promises as to the financial standing of the Cromwell Simon & Company and of the defendants Cromwell Simon or Harry M. Kassmir were ever made by the defendants J. W. Randolph or Samuel H. Robinson.

(14) What false or fraudulent representations or promises as to the care or watchfulness exercised for the benefit of said alleged victims by the said

defendants over investments made with them were ever made by any of the defendants, particularly the defendants J. W. Randolph and Samuel H. Robinson.

(15) The time and place of making, the names of the defendants who made and the names of the persons to whom the defendants, J. W. Randolph or Samuel H. Robinson, made any false or fraudulent representations or promises as in the last paragraph above set forth.

(16) What false or fraudulent representations or promises as to the alleged safety of purchasing stocks or other securities through the defendants and the said Cromwell Simon Company were ever made by the defendants, J. W. Randolph or Samuel H. Robinson. [132]

(17) The time of making and the persons to whom the defendants J. W. Randolph or Samuel H. Robinson, made any false or fraudulent representations or promises as in the last next preceding paragraph set forth.

(18) Whether or not either of said defendants, J. W. Randolph or Samuel H. Robinson, required any alleged victims to deliver over to defendants valuable securities as alleged collateral to secure deferred payments on stock subscribed for and if so the names of said victims, together with a description of any securities delivered to defendants by them and the time and place of said delivery.

(19) Whether or not said defendants J. W. Randolph or Samuel H. Robinson ever took or embezzled or converted any collateral securities to their

own use or benefit and if so a description of said securities, the names of the persons from whom taken or procured, the names of the defendants who so took said securities, the names of the defendants who embezzled or converted said securities, together with the time and place of such taking, embezzlement and conversion.

(20) What were the false representations which the defendants or any of them did not then or there or ever intend to carry out or perform, particularly with reference to the defendants J. W. Randolph or Samuel H. Robinson.

(21) To whom were the false representations referred to in the last next preceding paragraph made or communicated by means of letters or circulars or advertisements and what were the contents of said letters, circulars and advertisements.

(22) The names of the persons to whom false representations which the defendants did not then or there or ever [133] intend to carry out or perform were made and the time and place of said making, together with the names of the defendants making them or the names of agents who made them on behalf of said defendants.

(23) Whether or not the defendants J. W. Randolph or Samuel H. Robinson or either of them ever made any of the alleged alluring, exaggerated, misleading, false or fraudulent representations, pretenses or promises as set forth in sub-paragraphs 1, 2, 3, 4, and 5 of each and every count of said indictment and if so made, the names of the defendants making them, the names of the persons

to whom made, the places where made and the time of the making thereof.

(24) What were or are sufficient financial resources necessary to carry on a reliable brokerage business?

(25) What was or is the financial resources of any of the defendants named in said indictment or of Cromwell Simon & Company?

(26) What is a responsible brokerage house and what is necessary to constitute the same?

(27) Whether or not the alleged representation that persons could rely upon the standing or financial standing of Cromwell Simon & Company was or was not true.

(28) Whether or not the representations that the business of Cromwell Simon & Company was to sell to the alleged victims high-grade corporate stock and other securities on the partial payment plan or otherwise was or was not true.

(29) Whether or not the defendants or any of them or Cromwell Simon & Company, and particularly the defendants J. W. Randolph and Samuel H. Robinson received any orders from any person or persons for the purchase from them of [134] any corporate stock or securities and if so the names of the persons placing said orders or offers together with the time and place thereof and a description of the stock or securities embraced in said orders.

(30) Whether or not the alleged false representation that the defendants would obtain subscriptions from the alleged victims for stocks and other se-

curities on the Cromwell Simon & Company investment plan and would immediately purchase the same at a market price for and on account of the said alleged victim and that Cromwell Simon & Company would hold the same so that the alleged victims could be certain that the stocks and other securities would be on hand for them when called for by them was or was not true.

(31) Whether or not Cromwell Simon & Company ever received any orders which required them to immediately purchase stock or other securities at the market price or otherwise for the account of said alleged victims and if so the persons who placed said orders, the time and place thereof and the contents of said orders.

(32) Whether or not any dividends or interest were ever declared or payable on any high-grade stock or other securities purchased and held by defendants or Cromwell Simon & Company for any persons at all and if so when said dividends were declared or said interest was payable and on what stocks or securities and to what persons the defendants or Cromwell Simon & Company should have paid the same.

(33) What were or are the qualifications necessary on the part of Cromwell Simon & Company to qualify it to advise victims when to buy or sell corporate stocks or other securities and in what portion of such qualification was said company deficient? [135]

(34) What are the facts which resulted in said victims not being able to *realize* upon the defend-

ants or any of them for safe or other information or advice in the matter of buying or selling stocks or securities?

(35) What amounts of money or property did defendants J. W. Randolph or Samuel H. Robinson ever appropriate or embezzle to their own use or benefit?

(36) From whom did defendants J. W. Randolph or Samuel H. Robinson ever procure any money or property which they appropriated or embezzled to their own use and benefit.

(37) The times and places where the defendants J. W. Randolph or Samuel H. Robinson or either of them ever appropriated or embezzled to their own use or benefit any money or property.

(38) How or in what manner Exhibits "A" to "BBB" either individually or collectively could have been or were in furtherance of any alleged scheme or artifice to defraud, particularly with relation to the defendants J. W. Randolph or Samuel H. Robinson.

(39) How or in what manner any letters written by or pertaining to the business of the Charles Wesley Company of Los Angeles, California, have been or were in furtherance of any scheme to defraud set forth in any of the counts of said indictment, and particularly the letters alleged to be mailed or caused to be mailed by the defendants J. W. Randolph or Samuel H. Robinson or either of them.

(40) How or in what manner any letters written by or pertaining to the business of Thomas

Allen Company of Seattle, Washington, could have been or were in furtherance of any scheme or artifice to defraud set forth in said indictment?

(41) That said aforementioned matter relates to [136] general allegations contained in the indictment on file herein and that more particular and specific knowledge of such matters is necessary to said defendants on their trial and that without such particular knowledge said defendants will be unable to properly prepare their defense to said indictment or to prepare any defense at all.

This motion is made upon the indictment on file herein, upon the matters set forth in this motion and on the affidavits of defendants J. W. Randolph and Samuel H. Robinson filed herewith and attached hereto.

Respectfully submitted,

H. H. HARRIS,

Attorney for Defendants, J. W. Randolph and Samuel H. Robinson. [137]

[Title of Court and Cause.]

AFFIDAVITS OF J. W. RANDOLPH AND SAMUEL H. ROBINSON.

State of California,
County of Los Angeles,—ss.

J. W. Randolph and Samuel H. Robinson, being first duly sworn, each for himself deposes and says:

That he is one of the defendants in the above-entitled action; that the trial of the above-entitled

action has been set for the 29th day of May, 1928; that he is in possession of a copy of the indictment on file in the above-entitled action and that he has read the same; that said indictment purports to charge him with thirty-seven violations of section 215 of the Criminal Code of the United States; that said indictment contains and is almost entirely composed of allegations of acts alleged to have been committed by the defendants; that these acts are alleged in general terms and the indictment fails to allege the time, place or circumstances necessary to identification of any of the acts so alleged or necessary fully to advise affiant of the particular circumstances of said acts; that he has been informed by his attorney, H. H. Harris, and upon such information believes and alleges that unless he is furnished with a bill of particulars which said bill of particulars shall particularly and specifically inform him of the exact time when [138] said acts were committed, what particular place where said acts were committed and of the particular circumstances surrounding and comprising the commission of these acts, that he will be unable to properly prepare his defense to said indictment or to prepare any defense at all.

J. W. RANDOLPH.
SAMUEL H. ROBINSON.

Subscribed and sworn to before me this 7th day of May, 1928.

[Seal] VIVIAN M. HOOPS,

Notary Public in and for the County of Los Angeles, State of California.

My commission expires February 10, 1930.

[Endorsed] Filed May 8, 1928. [139]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 21st day of May, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable HAROLD LOUDERBACK, Judge.

[Title of Cause.]

MINUTES OF COURT—MAY 21, 1928—ORDER DENYING MOTION FOR BILL OF PARTICULARS, ETC.

It is by the Court ordered that the motion of defendant Orton E. Goodwin to require the United States Attorney to furnish a list of witnesses be and the same is hereby denied; that the petition for severance by defendant Samuel H. Robinson and the motion for severance by defendant Orton E Goodwin be and the same are hereby denied; that the motion of defendants J. W. Randolph and Samuel H. Robinson for bill of particulars be and

the same is hereby denied; that the motion of defendant Orton E. Goodwin for bill of particulars be and the same is hereby denied; and that the motion of defendant Harry M. Kassmir for bill of particulars be and the same is hereby denied. Ordered that the said defendants and each of them is hereby allowed an exception to the ruling of the Court. [140]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 29th day of May, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable HAROLD LOUDERBACK, Judge.

[Title of Cause.]

MINUTES OF COURT—MAY 29, 1928—TRIAL.

This case came on regularly this day for trial. The defendant Harry M. Kassmir was present in court in the custody of the U. S. Marshal and without an attorney; the defendants Samuel H. Robinson and J. W. Randolph were present with H. H. Harris, Esq., their attorney; the defendant Orton E. Goodwin was present with John A. McGee, Esq., his attorney. F. H. Ainsworth, Esq., was present as attorney for the defendant Cromwell Simon. Joseph L. Sweeney, Esq., George M. Naus, Esq., and Wm. A. O'Brien, Esq., Asst. U. S. Attys., were

present for and on behalf of United States. The defendants were called and each defendant answered to his name, excepting the defendant Cromwell Simon. The defendant Cromwell Simon was thereupon called by the United States Marshal and said defendant having failed to respond to his name, upon motion of Mr. Naus, it is ordered that the New Amsterdam Casualty Company produce the body of the defendant Cromwell Simon, and the said New Amsterdam Casualty Company having failed to produce the body of said defendant, IT IS ORDERED that the bond of said defendant Cromwell Simon be and the same is hereby forfeited unto the United States [141] of America, and that a writ of attachment issue for the arrest of said defendant Cromwell Simon. On motion of Mr. Harris, it is ordered that Robert B. McMillan, Esq., be and he is hereby substituted as attorney for the defendant Samuel H. Robinson in place and stead of H. H. Harris, Esq. Now comes James M. Hanley, Esq., and advised the Court that the defendant Harry M. Kassmir is without an attorney and moved the Court to continue the trial of this case. Mr. Harris, on behalf of the defendant J. W. Randolph, moved the Court to continue the trial of this case. Now comes Leo Friedman, Esq., and made a statement to the Court, and made a motion to be allowed to withdraw as attorney for the defendant Harry M. Kassmir. Harry M. Kassmir was sworn and testified on his behalf in support of the motion for a continuance. After hearing the attorneys, it is ordered that the motions of the defendants

Harry M. Kassmir and J. W. Randolph for a continuance of the trial of this case be and the same are hereby denied. Further ordered that Leo Friedman, Esq., be and he is hereby allowed to withdraw as attorney for the defendant Harry M. Kassmir. Ordered that Fred McDonald, Esq., be and he is hereby appointed as attorney for the defendant Harry M. Kassmir. Thereupon the Court ordered that this case do now proceed to trial. Thereupon the following persons, viz.:

1. Frank Paul,	7. J. E. Baker,
2. Fred'k F. Wright,	8. Stuart McMartin,
3. Louis E. Allen,	9. Leslie E. Alt,
4. George T. Morris,	10. A. E. Lisbon,
5. Chas. H. Moody,	11. Chas. W. Goodwin,
6. Thos. M. Jennings,	12. Richard W. Burke,

twelve good and lawful jurors, were, after being examined under oath, sworn to try the issues joined herein. Ordered that the further trial hereof be continued until Thursday, May 31, 1928, at 10 A. M., and the jury, after being duly admonished by the Court, were excused until that time. [142]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 31st day of May, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable HAROLD LOUDERBACK, Judge.

[Title of Cause.]

MINUTES OF COURT—MAY 31, 1928—TRIAL (RESUMED).

The defendants, Harry M. Kassmir, Samuel H. Robinson, Orton E. Goodwin and J. W. Randolph, the attorneys and the jury impaneled herein, being present as heretofore, the trial hereof was thereupon resumed. Ordered that all witnesses be and they are hereby excluded from the courtroom during the trial of this case. Mr. Sweeney made a statement to the Court and jury on behalf of the United States. Mrs. Emily A. Beans, Charles Burke, E. H. Beemer and Howard C. Ellis were sworn and testified on behalf of United States. The United States introduced in evidence and filed its exhibits marked Nos. 1, 2, 3, 4, 5, 6, 7 and 8. Ordered that the further trial hereof be continued to 10 A. M. to-morrow and the jury, after being admonished by the Court, was excused until that time. [143]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 1st day of June, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable HAROLD LOUDERBACK, Judge.

[Title of Cause.]

MINUTES OF COURT—JUNE 1, 1928—TRIAL (RESUMED).

The defendants Harry M. Kassmir, Samuel H. Robinson, Orton E. Goodwin and J. W. Randolph, the attorneys and the jury impaneled herein being present as heretofore, the trial hereof was thereupon resumed. Howard C. Ellis was recalled and V. A. Parks, Mary Christensen, Letitia W. McClintock, Robert Pigott were sworn and testified on behalf of United States. The United States introduced in evidence and filed its exhibits marked Nos. 9, 10, 11, 12, 13, 14, 15 and 16. Ordered that the further trial hereof be continued to 10:30 A. M. to-morrow. The jury, after being admonished by the Court, was excused until that time. [144]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 2d day of June, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable HAROLD LOUDERBACK, Judge.

[Title of Cause.]

MINUTES OF COURT—JUNE 2, 1928—TRIAL (RESUMED).

The defendants Harry M. Kassmir, Samuel H. Robinson, Orton E. Goodwin and J. W. Randolph, the attorneys and the jury impaneled herein being present as heretofore, the trial was resumed. Robert Pigott and Mary Christensen were recalled and Gustave A. Johnson and J. A. Bardin were sworn and testified on behalf of the United States. The United States introduced in evidence and filed its exhibits marked Nos. 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26. Ordered that the further trial hereof be continued until Monday, June 4, 1928, at 2 P. M., and the jury, after being admonished by the Court, was excused until that time. [145]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 4th day of June, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable HAROLD LOUDERBACK, Judge.

[Title of Cause.]

MINUTES OF COURT—JUNE 4, 1928—TRIAL (RESUMED).

The defendants Harry M. Kassmir, Samuel H.

Robinson, Orton E. Goodwin and J. W. Randolph, the attorneys and the jury impaneled herein being present as heretofore, the trial hereof was thereupon resumed. LeRoy F. Pike was sworn and testified on behalf of United States. The United States introduced in evidence and filed its exhibits marked Nos. 27, 28 and 29. Ordered that the further trial hereof be continued to 10 A. M. to-morrow, and the jury, after being duly admonished by the Court, was excused until that time. 146]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 5th day of June, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable HAROLD LOUDERBACK, Judge.

[Title of Cause.]

MINUTES OF COURT—JUNE 5, 1928—TRIAL (RESUMED).

The defendants Harry M. Kassmir, Samuel H. Robinson, Orton E. Goodwin and J. W. Randolph, the attorneys and the jury impaneled herein being present as heretofore, the trial hereof was thereupon resumed. LeRoy F. Pike and Gustave A. Johnson were recalled and Mrs. Tess Belford and Mrs. Annie G. Tiger were sworn and testified on behalf of the United States. The United States

introduced in evidence and filed its exhibits marked Nos. 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48 and 49. The defendant J. W. Randolph introduced in evidence and filed his exhibit marked Defendant Randolph's Exhibit "A."

Court ordered further trial continued to 10 A. M. to-morrow and the jury, after being admonished by the Court, was excused until that time. [147]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 6th day of June, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable HAROLD LOUDERBACK, Judge.

[Title of Cause.]

MINUTES OF COURT—JUNE 6, 1928—TRIAL (RESUMED).

The defendants Harry M. Kassmir, Samuel H. Robinson, Orton E. Goodwin and J. W. Randolph, the attorneys and the jury impaneled herein being present as heretofore, the trial hereof was thereupon resumed. On motion of F. H. Ainsworth, Jr., it is ordered that he be and he is hereby allowed to withdraw as attorney for defendant Cromwell Simon. Ernest Hipp and Clara Oliver were sworn and testified on behalf of the United States. The United States introduced in evidence and filed its

exhibits marked Nos. 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, and 79. Ordered that the further trial hereof be continued to 10 A. M. tomorrow, and the jury, after being duly admonished by the Court, was excused until that time. [148]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 7th day of June, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable HAROLD LOUDERBACK, Judge.

[Title of Cause.]

MINUTES OF COURT—JUNE 7, 1928—TRIAL (RESUMED).

The defendants Harry M. Kassmir, Samuel H. Robinson, Orton E. Goodwin and J. W. Randolph, the attorneys and the jury impaneled herein, being present as heretofore, the trial hereof was thereupon resumed. V. A. Parks and Mary Christensen were recalled and Bernhard Kellman, Van Mater Smith, Herbert D. McCaffrey, W. F. Allen, John Cummings, Joseph M. Kane, P. A. Nagan, George Bernard and Mary Esther Durham were sworn and testified on behalf of United States. The United States introduced in evidence and filed

its exhibits marked Nos. 80, 81, 82, 83, 84, 85, 86, 87, 88, 89 and 90. Defendants introduced in evidence and filed their exhibit marked Defendants' Exhibit "B." Ordered that the further trial hereof be continued to 10 A. M. to-morrow and the jury, after being admonished by the Court, was excused until that time. [149]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 8th day of June, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable HAROLD LOUDERBACK, Judge.

[Title of Cause.]

MINUTES OF COURT—JUNE 8, 1928—TRIAL (RESUMED).

The defendants Harry M. Kassmir, Samuel H. Robinson, Orton E. Goodwin and J. W. Randolph, the attorneys and the jury impaneled herein being present as heretofore, the trial hereof was thereupon resumed. Mary Esther Durham was recalled and John J. Allen, Jr., was sworn and testified on behalf of the United States. The United States introduced in evidence and filed its exhibits marked Nos. 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104 and 105. On the cross-examination of

Mary Esther Durham, the defendant J. W. Randolph introduced in evidence and filed his exhibits marked Defendant Randolph's Exhibits "C," "D," "E," "F" and "G." Ordered that the further trial hereof be continued until 10:30 A. M. to-morrow, and the jury, after being admonished by the Court, were excused until that time. [150]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 9th day of June, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable HAROLD LOUDERBACK, Judge.

[Title of Cause.]

MINUTES OF COURT—JUNE 9, 1928—TRIAL (RESUMED).

The defendants Harry M. Kassmir, Samuel H. Robinson, Orton E. Goodwin and J. W. Randolph, the attorneys and the jury impaneled herein being present as heretofore, the trial hereof was thereupon resumed. Mary Esther Durham was recalled and M. I. Henderson, Sam Goodman, Edward McClintock, W. C. Owen and Wm. I. Madeira were sworn and testified on behalf of the United States. The United States introduced in evidence and filed its exhibits marked Nos. 106, 107, 108 and 109. Or-

dered that the further trial hereof be continued until Tuesday, June 12th, 1928, at 10:30 A. M., and the jury, after being admonished by the Court, was excused until that time. [151]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 12th day of June, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable HAROLD LOUDERBACK, Judge.

[Title of Cause.]

MINUTES OF COURT—JUNE 12, 1928—TRIAL (RESUMED).

The defendants Harry M. Kassmir, Samuel H. Robinson, Orton E. Goodwin and J. W. Randolph, the attorneys and the jury being present as heretofore, the trial hereof was thereupon resumed. William I. Madeira was recalled and F. W. Lauck was sworn and testified on behalf of the United States. The United States introduced in evidence and filed its exhibits marked Nos. 110 and 111. On motion of J. L. Sweeney, Esq., Asst. U. S. Atty., it is ordered that Count No. 34 of the indictment be and the same is hereby dismissed. Thereupon the United States rested. Mr. McGee made a motion to instruct the jury to return a verdict of Not

Guilty as to the defendant Orton E. Goodwin, which said motion was ordered denied, and defendant allowed an exception. Mr. McMillan made a motion to instruct the jury to return a verdict of Not Guilty as to the defendant Samuel H. Robinson, which said motion was ordered denied and defendant allowed an exception. Mr. Harris made a motion to instruct the jury to return a verdict of Not Guilty as to the defendant J. W. Randolph, which said motion was ordered denied and defendant allowed an exception. Mr. McDonald made a motion to instruct the jury to return a [152] verdict of Not Guilty as to the defendant Harry M. Kassmir, which said motion was ordered denied and defendant allowed an exception. Mr. Harris made a statement to the Court and jury on behalf of the defendant J. W. Randolph. R. S. Creuss and F. B. Paddock were sworn and testified on behalf of defendant J. W. Randolph.

Court ordered that the further trial hereof be continued to 10:15 A. M. to-morrow and the jury, after being admonished by the Court, was excused until that time. [153]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 13th day of June, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable HAROLD LOUDERBACK, Judge.

[Title of Cause.]

MINUTES OF COURT—JUNE 13, 1928—TRIAL (RESUMED).

The defendants Harry M. Kassmir, Samuel H. Robinson, Orton E. Goodwin and J. W. Randolph, the attorneys and the jury impaneled herein being present as heretofore, the trial hereof was thereupon resumed. Sam Goodman and Herbert D. McCaffrey were recalled and Kenneth Sim, Carl S. Kelty, Ernest F. Peterson and Orton E. Goodwin were sworn and testified on behalf of the defendant Orton E. Goodwin. The defendant Orton E. Goodwin introduced in evidence and filed his exhibits marked "A," "B" and "C." V. A. Parks was recalled and testified on behalf of defendant J. W. Randolph. Harry M. Kassmir was sworn and testified on his own behalf. Ordered that the further trial hereof be continued until 10 A. M. to-morrow, and the jury, after being admonished by the Court, was excused until that time. [154]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 14th day of June, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable HAROLD LOUDERBACK, Judge.

[Title of Cause.]

MINUTES OF COURT—JUNE 14, 1928—TRIAL (RESUMED).

The defendants Harry M. Kassmir, Samuel H. Robinson, Orton E. Goodwin and J. W. Randolph, the attorneys and the jury impaneled herein, being present as heretofore, the trial hereof was thereupon resumed. Harry M. Kassmir was recalled and Alex Tasloff was sworn and testified on behalf of defendant Harry M. Kassmir; and the defendant Harry M. Kassmir thereupon rested. J. W. Randolph was sworn and testified on his own behalf. Maynard Dixon was sworn and testified on behalf of defendant Orton E. Goodwin. C. F. Tramutolo was sworn and testified on behalf of defendant Samuel H. Robinson. Court ordered further trial hereof continued to 10 A. M. to-morrow, and the jury, after being admonished by the Court, was excused until that time. [155]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 15th day of June, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable HAROLD LOUDERBACK, Judge.

[Title of Cause.]

MINUTES OF COURT—JUNE 15, 1928—TRIAL (RESUMED).

The defendant Harry M. Kassmir, Samuel H. Robinson, Orton E. Goodwin and J. W. Randolph, the attorneys and the jury impaneled herein being present as heretofore, the trial hereof was this day resumed. J. W. Randolph was recalled and further testified on his own behalf. On cross-examination of J. W. Randolph, the United States introduced in evidence and filed its exhibit marked No. 112.

Thereupon all of the defendants rested, and the evidence was closed.

Mr. McMillan made a motion to instruct the jury to return a verdict of Not Guilty as to the defendant Samuel H. Robinson; Mr. McGee made a motion to instruct the jury to return a verdict of not guilty as to the defendant Orton E. Goodwin; Mr. Harris made a motion to instruct the jury to return a verdict of not guilty as to the defendant J. W. Randolph; and Mr. McDonald made a motion to instruct the jury to return a verdict of not guilty as to the defendant Harry M. Kassmir. After hearing the attorneys, it is ordered that said motions be and the same are hereby submitted. [156]

Court ordered the further trial hereof be continued to Tuesday, June 19, 1928, at 10 o'clock A. M., and the jury, after being admonished by the Court, was excused until that time. [157]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 19th day of June, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable HAROLD LOUDERBACK, Judge.

[Title of Cause.]

MINUTES OF COURT—JUNE 19, 1928—TRIAL (RESUMED).

The defendants Harry M. Kassmir, Samuel H. Robinson, Orton E. Goodwin and J. W. Randolph, the attorneys and the jury impaneled herein being present as heretofore, the trial hereof was thereupon resumed. It is ordered that the motions of the defendants Harry M. Kassmir, Samuel H. Robinson and J. W. Randolph to instruct the jury to return a verdict of Not Guilty be and the same are hereby denied; to which ruling of the Court each of said defendants duly excepted.

It is ordered that the motion of the defendant Orton E. Goodwin to instruct the jury to return a verdict of Not Guilty be and the same is hereby granted.

Thereupon the attorneys made their arguments to the Court and jury and at the conclusion of said arguments, it is ordered that the further trial hereof be continued to 10 A. M. to-morrow, and the jury,

after being admonished by the Court, was excused until that time. [158]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 20th day of June, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable HAROLD LOUDERBACK, Judge.

[Title of Cause.]

MINUTES OF COURT—JUNE 20, 1928—TRIAL (RESUMED).

The defendants Harry M. Kassmir, Samuel H. Robinson, Orton E. Goodwin and J. W. Randolph, the jury impaneled herein and all of the attorneys for the respective parties were present, excepting H. H Harris, Esq., attorney for the defendant J. W. Randolph. Thereupon the Court ordered the Bailiff to call the name of H. H. Harris, Esq., and the Bailiff accordingly called the name of said H. H. Harris, Esq., and received no response until 10:30 A. M. After hearing H. H. Harris, Esq., it is ordered that said H. H. Harris, Esq., be and he is hereby adjudged guilty of contempt of this court for failure to be present at the convening of this court, and that he pay a fine in the sum of One Hundred ($100.00) Dollars, and in default of the payment of said fine that the said H. H.

Harris, Esq., be committed into the custody of the United States Marshal until said fine is paid or he is otherwise discharged by due process of law.

Thereupon the further trial of this case was proceeded with. After the instructions of the Court to the jury, the jury, at 11:05 A. M., retired to deliberate upon their verdict. [159]

IT IS ORDERED that the U. S. Marshal for this District furnish meals to the jury and two bailiffs.

At 2:50 P. M., the jury returned into court and being asked if they had agreed upon their verdicts, replied in the affirmative and returned the following verdicts, which were ordered recorded, viz.:

"We, the Jury, find Harry M. Kassmir, the fendant at the bar, guilty on all counts.

L. E. ALT,
Foreman."

"We, the Jury, find J. W. Randolph, the defendant at the bar, guilty on all counts.

L. E. ALT,
Foreman."

"We, the Jury, find Samuel H. Robinson, the defendant at the bar, guilty on Counts Nos. 25, 26, 27, 28, 29, 30, 31, 32, 35, 36, 37, 38.

L. E. ALT,
Foreman."

"We, the Jury, find Orton E. Goodwin, the defendant at the bar, not guilty on all counts.

L. E. ALT,
Foreman."

The jury upon being asked if said verdicts as recorded are their verdicts, each juror replied that they are. Ordered that the jury be discharged from the further consideration hereof.

Mr. McDonald made a motion for a new trial and a motion in arrest of judgment, on behalf of defendant Harry M. Kassmir, which said motions were ordered denied and defendant allowed an exception.

Mr. McMillan made and filed a motion for a new trial and made and filed a motion in arrest of judgment, on behalf of defendant Samuel H. Robinson, which said motions were ordered denied, and defendant allowed an exception. [160]

Mr. Harris made and filed a motion for a new trial and made and filed a motion in arrest of judgment, on behalf of defendant J. W. Randolph, which said motions were ordered denied, and defendant allowed an exception.

Defendants were duly called for judgment, duly informed by the Court of the nature of the indictment filed herein against them, of their arraignment, and pleas of Not Guilty; of their trial and the verdict of the jury. Defendants were then asked if they had any legal cause to show why judgment should not be entered herein and no sufficient cause being shown or appearing to the Court, and the Court having denied a motion for new trial and a motion in arrest of judgment; thereupon the Court ordered that

Defendant HARRY M. KASSMIR be imprisoned in a U. S. Penitentiary for the period of

5 years and pay a fine in sum of $500.00 as to the 2d Count; that he be imprisoned for the period of 5 years and pay a fine in sum of $500.00 as to the 3d Count; and in default of the payment of said fine defendant be further imprisoned until said fine is paid or he be otherwise discharged by due process of law; and that he be imprisoned on each of the remaining counts on which he was convicted for the period of 5 years, all of said terms of imprisonment to run concurrently. Further ordered that said term of imprisonment commence and run from January 10, 1928, provided said defendant does not appeal or be released from custody on bond.

ORDERED that defendant SAMUEL H. ROBINSON be imprisoned in a U. S. Penitentiary for the period of 1 year and 1 day as to the 25th Count, and he be imprisoned on each of the remaining counts on which he was convicted for the period of 1 year and 1 day, all of said terms of imprisonment to run concurrently. [161]

ORDERED that defendant J. W. RANDOLPH be imprisoned in a U. S. Penitentiary for the period of 4 years and pay a fine in sum of $500.00 as to the 2d Count; that he be imprisoned for the period of 4 years and pay a fine in sum of $500.00 as to the 3d Count, and in default of payment of fine defendant be further imprisoned until said fine is paid or he be otherwise discharged by due process of law; and that he be imprisoned on each of the remaining counts on which he was convicted for the period of 4 years, all of said terms of imprisonment to run concurrently.

ORDERED that said defendant stand committed to custody of U. S. Marshal for this District to execute said judgments, and that commitments issue accordingly.

ORDERED that defendant ORTON E. GOODWIN be and he is hereby discharged, and that the bond of said defendant be exonerated and the sureties thereon discharged. [162]

[Title of Court and Cause.]

VERDICT (SAMUEL ROBINSON).

We, the jury, find Samuel H. Robinson, the defendant at the bar, guilty on Counts Nos. 25, 26, 27, 28, 29, 30, 31, 32, 35, 36, 37, 38.

L. E. ALT,
Foreman.

[Endorsed]: Filed June 20, 1928, at 2 o'clock and 50 min. P. M. [163]

[Title of Court and Cause.]

VERDICT (J. W. RANDOLPH).

We, the jury, find J. W. Randolph, the defendant at the bar, guilty on all counts.

L. E. ALT,
Foreman.

[Endorsed]: Filed June 30, 1928, at 2 o'clock and 50 minutes P. M. [164]

[Title of Court and Cause.]

MOTION OF SAMUEL H. ROBINSON FOR NEW TRIAL.

Now comes the above-named defendant, Samuel H. Robinson, by his attorney, R. B. McMillan, and moves the Court to set aside the verdict herein and to grant a new trial, and as reasons therefor show to the Court the following:

I.

The Court erred in overruling said defendant's demurrer to the indictment and each count thereof.

II.

The Court erred in denying said defendant's motion for severance of trial on file herein.

III.

The verdict is contrary to the law of the case.

IV.

The verdict is not supported by the evidence in the case.

V.

The Court upon the trial of the case admitted incompetent [165] evidence offered by the United States.

VI.

The Court upon the trial of the case excluded competent evidence offered by said defendant.

VIII.

That in the testimony it does not affirmatively or otherwise appear that the above-entitled court had

jurisdiction over the offenses, or any of them, alleged in the indictment, in this, that there is no proof that the alleged offenses, or any of them, were or was committed within the jurisdiction of the above-entitled court.

IX.

That the Court improperly instructed the jury to the substantial prejudice of said defendant.

X.

That the Court improperly refused, to the substantial prejudice of said defendant, to give correct instructions on the law tendered by said defendant.

XI.

The Court erred in refusing to direct a verdict of Not Guilty at the close of the evidence of the United States.

XII.

The Court erred in refusing to direct a verdict of Not Guilty at the close of all the evidence.

Dated, San Francisco, California, June ——, 1928.

R. B. McMILLAN,

Attorney for Said Defendant Samuel H. Robinson.

[Endorsed]: Filed June 20, 1928. [166]

[Title of Court and Cause.]

MOTION OF SAMUEL H. ROBINSON IN ARREST OF JUDGMENT.

And now after verdict against the above-named defendant, Samuel H. Robinson, and before sentence, comes the said defendant in his own proper person and by his attorney, R. B. McMillan, and moves the Court here to arrest judgment herein and not pronounce the same, for the following reasons, to wit:

I.

That the indictment, and each count thereof, in this cause does not state facts sufficient to constitute a public offense under the laws of the United States against the said defendant.

II.

That it appears from the record in the above-entitled cause that the judgment, if made and entered, would be unlawful. [167]

III.

And this defendant further specifies as grounds for this motion in arrest of judgment each and every ground contained and set forth in the demurrer of this defendant on file in this cause.

IV.

That it appears from the record and testimony in the above-entitled cause that the Court erred in denying the motion of said defendant for severance of trial, on file herein.

V.

That in the testimony it does not affirmatively or otherwise appear that the above-entitled court had jurisdiction over the offenses, or any of them, alleged in the indictment, in this, that there is no proof that the alleged offenses, or any of them, were or was committed within the jurisdiction of the above-entitled court.

VI.

That the indictment, and each and every count thereof, is not sufficient in form or substance to enable this defendant to plead the judgment in bar of another prosecution for the same offense.

WHEREFORE, because of which said errors in the record herein no lawful judgment can be rendered by the Court, the said defendant prays that this Honorable Court arrest and withhold the judgment herein, and that the verdict herein be vacated and set aside and declared null and void.

R. B. McMILLAN,

Attorney for Defendant Samuel H. Robinson.

Dated: San Franscico, California, June ——, 1928. [168]

[Endorsed]: Filed June 20, 1928. [169]

[Title of Court and Cause.]

MOTION OF J. W. RANDOLPH FOR NEW TRIAL.

Now comes the above-named defendant, J. W. Randolph, by his attorney, H. H. Harris, and moves

the Court to set aside the verdict herein and to grant a new trial, and as reasons therefor shows to the Court the following:

I.

The Court erred in overruling said defendant's demurrer to the indictment and each count thereof.

II.

The verdict is contrary to the law of the case.

III.

The verdict is not supported by the evidence in the case.

IV.

The Court, upon the trial of the case, admitted incompetent evidence offered by the United States.

V.

The Court, upon the trial of the case, excluded competent evidence offered by said defendant.

VI.

That in the testimony it does not affirmatively or [170] otherwise appear that the above-entitled court had jurisdiction over the offenses, or any of them, alleged in the indictment, in this, that there is no proof that the alleged offenses were, or any of them was, committed within the jurisdiction of the above-entitled court.

VII.

That the Court improperly instructed the jury to the substantial prejudice of said defendant.

VIII.

That the Court improperly refused, to the sub-

stantial prejudice of said defendant, to give correct instructions on the law tendered by said defendant.

IX.

The Court erred in refusing to direct a verdict of Not Guilty at the close of the evidence of the United States.

X.

The Court erred in refusing to direct a verdict of Not Guilty at the close of all the evidence.

Dated: San Francisco, California, June 20, 1928.

H. H. HARRIS,

Attorney for Said Defendant J. W. Randolph.

[Endorsed]: Filed June 20, 1928. [171]

[Title of Court and Cause.]

MOTION OF J. W. RANDOLPH IN ARREST OF JUDGMENT.

And now after verdict against the above-named defendant, J. W. Randolph, and before sentence, comes the said defendant in his own proper person and by his attorney, H. H. Harris, and moves the Court here to arrest judgment herein and not pronounce the same, for the following reasons, to wit:

I.

That the indictment, and each count thereof, in this cause does not state facts sufficient to constitute a public offense under the laws of the United States against the said defendant.

II.

That it appears from the record in the above-entitled cause that the judgment, if made and entered, would be unlawful.

III.

And this defendant further specifies as grounds for this motion in arrest of judgment each and every ground [172] contained and set forth in the demurrer of this defendant on file in this cause.

IV.

That in the testimony it does not affirmatively or otherwise appear that the above-entitled court had jurisdiction over the offenses, or any of them, alleged in the indictment, in this, that there is no proof that the alleged offenses, or any of them, were or was committed within the jurisdiction of the above-entitled court.

V.

That the indictment, and each and every count thereof, is not sufficient in form or substance to enable this defendant to plead the judgment in bar of another prosecution for the same offense.

WHEREFORE, because of which said errors in the record herein no lawful judgment can be rendered by the Court, the said defendant prays that this Honorable Court arrest and withhold the judgment herein, and that the verdict herein be vacated and set aside and declared null and void.

H. H. HARRIS,

Attorney for Defendant J. W. Randolph.

Dated: San Francisco, California, June 20th, 1928.

[Endorsed]: Filed June 20, 1928. [173]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 19217.

Convicted Violation of Section 215, Criminal Code of the United States.

THE UNITED STATES OF AMERICA

vs.

SAMUEL H. ROBINSON.

JUDGMENT ON VERDICT OF GUILTY—COUNTS NOS. 25, 26, 27, 28, 29, 30, 31, 32, 35, 36, 37, 38.

Joseph L. Sweeney, Assistant United States Attorney, and the defendant with his counsel came into court. The defendant was duly informed by the Court of the nature of the indictment filed on the 21st day of February, 1928, charging him with the crime of violation of Section 215, Criminal Code of the United States; of his arraignment and plea of Not Guilty; of his trial and the verdict of the jury on the 20th day of June, 1928, to wit:

We, the jury, find Samuel H. Robinson, the defendant at the bar, guilty on Counts Nos. 25, 26, 27, 28, 29, 30, 31, 32, 35, 36, 37, 38.

L. E. ALT,
Foreman.

The defendant was then asked if he had any legal cause to show why judgment should not be entered herein and no sufficient cause being shown or appearing to the Court, and the Court having denied a motion for new trial and a motion in arrest of judgment; thereupon the Court rendered its judgment: THAT, WHEREAS, the said SAMUEL H. ROBINSON having been duly convicted in this court of the crime of violation of Section 215, Criminal Code of the United States,—

IT IS THEREFORE ORDERED AND ADJUDGED that the said SAMUEL H. ROBINSON be imprisoned in a United States penitentiary [174] for the period of ONE (1) YEAR and ONE (1) DAY, as to the 25th count of the indictment, and that on each of the remaining counts on which he stands convicted that he be imprisoned in a United States Penitentiary for the period of ONE (1) YEAR and ONE (1) DAY; said terms of imprisonment to run concurrently.

Judgment entered this 20th day of June, A. D. 1928.

WALTER B. MALING
Clerk.
By C. W. Calbreath,
Deputy Clerk.

Entered in Vol. 23 Judg. and Decrees, at Page 53. [175]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 19217.

Convicted Violation of Section 215, Criminal Code of the United States.

THE UNITED STATES OF AMERICA

vs.

J. W. RANDOLPH.

JUDGMENT ON VERDICT OF GUILTY—ALL COUNTS.

Joseph L. Sweeney, Assistant United States Attorney, and the defendant with his counsel came into court. The defendant was duly informed by the Court of the nature of the indictment filed on the 21st day of February, 1928, charging him with the crime of violation of Section 215, Criminal Code of the United States; of his arraignment and plea of Not Guilty; of his trial and the verdict of the jury on the 20th day of June, 1928, to wit:

> We, the jury, find J. W. Randolph, the defendant at the bar, guilty on all counts.
>
> L. E. ALT,
> Foreman.

The defendant was then asked if he had any legal cause to show why judgment should not be entered

herein and no sufficient cause being shown or appearing to the Court, and the Court having denied a motion for new trial and a motion in arrest of judgment; thereupon the Court rendered its judgment: THAT, WHEREAS, the said J. W. RANDOLPH having been duly convicted in this court of the crime of violation of Section 215, Criminal Code of the United States,— [176]

IT IS THEREFORE ORDERED AND ADJUDGED that the said J. W. RANDOLPH be imprisoned in a United States Penitentiary for the period of Four (4) Years and pay a fine in the sum of Five Hundred ($500.00) Dollars as to the Second Count of the indictment; that he be imprisoned for the period of Four (4) Years and pay a fine in the sum of Five Hundred ($500.00) Dollars as to Third Count of the indictment; that on each of the remaining counts of the indictment on which he stands convicted that he be imprisoned for the period of Four (4) years; said terms of imprisonment to run concurrently; further ordered that in default of the payment of said fine that said defendant be further imprisoned until said fine be paid or until he be otherwise discharged in due course of law.

Judgment entered this 20th day of June, A. D. 1928.

WALTER B. MALING,
Clerk.
By C. W. Calbreath,
Deputy Clerk.

Entered in Vol. 23 Judg. and Decrees, at Page 54.
[177]

[Title of Court and Cause.]

NOTICE OF APPEAL (SAMUEL H. ROBINSON AND J. W. RANDOLPH).

To the United States of America, Appellee, and GEORGE J. HATFIELD, Esq., United States Attorney in and for the Northern District of California, as Attorney for Said Appellee:

You and each of you will please take notice that the above-named defendants, Samuel H. Robinson and J. W. Randolph, hereby appeal, and each hereby appeals, to the United States Circuit Court of Appeals, in and for the Ninth Circuit from the judgments entered in said cause against said defendants, and each of them, on June 20, 1928, and that the certified transcript of record will be filed in the said United States Circuit Court of Appeals within the time and as provided by law.

Dated, June 29, 1928.

JAMES B. O'CONNOR,
HAROLD C. FAULKNER,
H. H. HARRIS,

Attorneys for Defendant J. W. Randolph, Humboldt Bank Building, San Francisco. [178]

R. B. McMILLAN,

Attorney for Defendant Samuel H. Robinson, 1810 Russ Building, San Francisco.

Due service of the within notice of appeal and

receipt of a copy thereof hereby admitted this 29 day of June, 1928.

GEO. J. HATFIELD,
J. L. SWEENEY,
Attorneys for U. S.

[Endorsed]: Filed Jun. 29, 1928. [179]

[Title of Court and Cause.]

PETITION FOR APPEAL AND SUPERSEDEAS.

Now come the above-named defendants, Samuel H. Robinson and J. W. Randolph, through their attorneys (R. B. McMillan for defendant Samuel H. Robinson) and (James B. O'Connor, H. H. Harris, and Harold C. Faulkner, for the defendant J. W. Randolph), and feeling themselves, and each feeling himself, aggrieved by the judgments of this Court made and entered June 20, 1928, in the above-entitled cause, wherein and whereby these defendants are sentenced to be imprisoned and to pay fines as set forth in the judgments made and entered by the Court in said cause, to which judgments reference is hereby made for greater particularity, your petitioners say that they, and each of them, are advised by their counsel, and therefore that they aver, that there was and is manifest error in the record and proceedings had in said cause, and in the making, rendition and entry of said judgments and sentences, and each of them, to the injury and damage of your petitioners, and each of your peti-

tioners, all of which errors may be fully made to appear by an examination of the assignment of errors and the bill of exceptions [180] filed herein and presented herewith.

And hereby petition this Honorable Court for an appeal herein to the United States Circuit Court of Appeals in and for the Ninth Circuit, and that a full, true and correct transcript of the record and proceedings in said cause be transmitted by the Clerk of this Court to the Clerk of the said United States Circuit Court of Appeals; and that during the pendency of this appeal all proceedings had by this Court be suspended, stayed and superseded, and that during the pendency of said appeal the said defendants, and each of them, be admitted to bail in such sum or sums as to this Court seems meet and proper.

Dated, San Francisco, California, June 29, 1928.

JAMES B. O'CONNOR,
H. H. HARRIS,
HAROLD C. FAULKNER,
Attorneys for Defendant J. W. Randolph.
R. B. McMILLAN,
Attorney for Defendant Samuel H. Robinson.

Due service of the within petition and receipt of a copy thereof hereby admitted this 29 day of June, 1928.

GEO. J. HATFIELD,
J. L. SWEENEY,
Attorneys for U. S.

[Endorsed]: Filed Jun. 29, 1928. [181]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Samuel H. Robinson and J. W. Randolph, defendants in the above-entitled cause, and plaintiffs on appeal herein, having petitioned for an order from said court permitting them, and each of them, to appeal to the United States Circuit Court of Appeals in and for the Ninth Circuit, from the judgments and sentences entered in the above-entitled cause against said Samuel H. Robinson and J. W. Randolph, and said defendants having duly given notice of appeal as provided by law, now make and file with their said petition for appeal the following assignment of errors herein, upon which they and each of them will apply for a reversal of said judgments and sentences, and each of them, upon appeal, and which said errors, and each of them, are to the great detriment, injury and prejudice of said defendants, and each of them, and in violation of the rights conferred upon him by law; and each of said defendants says that in the record and proceedings in the [182] above-entitled cause, upon the hearing and determination thereof, in the Southern Division of the United States District Court for the Northern District of California, there is manifest error in this, to wit:

I.

That the above-entitled court erred, to the substantial prejudice of said defendants, and each of them, in overruling the demurrer of said defend-

ants to the indictment herein. That a copy of said demurrer is set forth at length in the bill of exceptions (Exception No. 1) filed herewith, to which special reference is hereby made as the same is made a part hereof.

II.

That the above-entitled court erred, to the substantial prejudice of said defendants, and each of them, in overruling the demands for bill of particulars of said defendants to the indictment herein. That a copy of said demands is set forth at length in the bill of exceptions (Exception No. 2) filed herewith, to which exception reference is hereby made as the same is made a part hereof.

III.

That the above-entitled court erred, to the substantial prejudice of said defendants, and each of them, in overruling petition for severance of said defendant Samuel H. Robinson. That a copy of said petition is set forth at length in the bill of exceptions (Exception No. 3) filed herewith, to which special reference is hereby made as the same is made a part hereof.

IV.

That the Court erred in admitting in evidence certain testimony over the objection of defendants, as will more fully appear as follows:

I reside in Oakland, 608 Excelsior Boulevard, and during the year 1925 resided at 5838 Birch Court, which was my own [183] house. I know the defendants J. W. Randolph, Harry Kassmir and Samuel H. Robinson. (Witness here identifies said

three defendants in the courtroom.) I doubt if I would recognize Ortin E. Goodwin; I never met him, I think but once. The defendant, Cromwell Simon, who is not here, I know; I met him two times. Met Mr. Randolph some time during the early part of the year 1925; he came to my house, I am not sure whether it was by appointment, or not, but he came to my house, and we talked along socially for a little bit, and then he finally broached the subject; he said that he would like to help me to make back some of the money that he had caused me to lose in the Nabisco Company, and he said, "Haven't you got some stock laying around here that is not paying any money only dividends"? and I said, "Why, yes, I have got some stock, but I don't know whether I want to let it go or not," and he explained to me how he could take those stocks and put them in Cromwell Simon and have them pay me good money; let them lay in Cromwell Simon's vault as collateral, and then they would buy me some stock, whatever I wanted, Hudson, or Studebaker, whatever I might see fit, and be earning a little money for me; prior to this visit I had some business dealings with Mr. Randolph—I bought Georgie Fruit Company, and lost considerable money on that transaction.

EXCEPTION No. 4.

Mr. McMILLAN.—May it be understood that I object to that testimony upon the ground that so far as the defendant Robinson is concerned it is too remote, incompetent, and hearsay.

The COURT.—Will you connect this up with this matter?

Mr. SWEENEY.—It is just a matter of identification of Mr. Randolph, and showing the entree that Mr. Randolph had to this lady.

Mr. SWEENEY.—I will offer to connect it up, if I do not [184] connect it up it will be ruled out.

The COURT.—Connect it up as a part of the case, or simply as identification?

Mr. SWEENEY.—I will have to stand on my former statement, just as a matter of identification.

The COURT.—It will be received for that purpose, and only for that limited purpose, and the objection will be overruled.

Mr. McMILLAN.—May we respectfully note an exception?

The COURT.—Yes.

WITNESS.—(Continuing.) During Mr. Randolph's first visit in March, 1925, I did not give him any stocks; my stocks were at Berkeley in the safe deposit vault, but I agreed to get them out and he was to come over again and see the stock. I got the stock home, and Mr. Randolph came up by appointment; he came alone. This second visit was along in the latter part of March, 1925; I cannot fix the date; I have tried to forget the whole transaction. Only myself and Mr. Randolph present.

V.

That the Court erred in admitting in evidence

certain testimony over the objection of defendants, as will more fully appear as follows:

Q. What was the conversation you had with Mr. Randolph at that time?

Mr. McMILLAN.—So far as the defendant Robinson is concerned, that is objected to on the ground it is hearsay, and is *res inter alios acta.*

Mr. SWEENEY.—It is all part of one scheme.

The COURT.—The objection will be overruled.

Mr. McMILLAN.—Note an exception.

(That the evidence admitted over the foregoing objection [185] and under the ruling of the Court is fully set forth in the bill of exceptions (Exception No. 5) filed herewith, to which special reference is hereby made as the same is made a part hereof.)

VI.

That the Court erred in admitting in evidence certain testimony over the objection of defendants, as will more fully appear as follows:

Q. Now, can you tell us more definitely the conversation you had with Mr. Kassmir on that occasion?

Mr. HARRIS.—That is objected to on the ground there is no foundation laid yet; I only want all of the parties present.

Mr. SWEENEY.—Who was present at that time?

A. Just Cromwell Simon, and I do not think he was in the room all the while.

Q. Who else? A. Mr. Kassmir.

Mr. McMILLAN.—I ask leave at this time, so that my objection will appear clearly in the record—

I make an objection on behalf of the defendant Samuel Robinson, first that this testimony is too remote so far as that defendant is concerned, that it is *res inter alios acta,* that it is hearsay, and, furthermore, they are seeking to bring in declarations and actions at a time that is remote to the charges contained in this indictment; this is not a conspiracy charge, but a charge under Section 215 of the Criminal Code, the 38 counts being based under that section, and they are substantive offenses, not any charge of conspiracy, and none of these statements, none of these situations, none of these conversations that the witness has related, in so far as the defendant Robinson is concerned, are in any way, shape, or form binding upon him, and hearsay, and incompetent, and your Honor will note from the opening statement of the District Attorney that Mr. Robinson had not even met these persons at that time. [186]

The COURT.—What have you to say to that?

Mr. SWEENEY.—Just this, that the Government is showing a scheme, and in the performance of that scheme admissions or statements made by one of the—I was going to say one of the conspirators—one of the persons, one of the defendants, binds the others, if it was for the purpose of furthering the scheme.

The COURT.—Your contention is the way of proving a scheme or artifice like this, that it is as proving a conspiracy?

Mr. SWEENEY.—Absolutely. If we can con-

nect Mr. Robinson up with this scheme at any time, he is responsible for everything.

The COURT.—Is it your theory that statements made by those engaged in the common design can be used against one another irrespective of whether there is a conspiracy or not?

Mr. SWEENEY.—If you will indulge me for a minute or so I will find it for you.

Mr. McMILLAN.—My further point is this, as far as my client is concerned, that he did not even know any of the parties at that time.

The COURT.—That goes to different points.

Mr. McMILLAN.—It is in line with what may be connected up.

The COURT.—We have the whole record to find out whether it is connected up, or not. I think that point has been pretty well covered, that at the present moment there is not in the record statements which connect up the parties who are on trial.

Mr. McMILLAN.—Furthermore, it is too remote, and *res inter alios acta,* and hearsay.

Mr. SWEENEY.—May I quote the syllabus from U. S. vs. Belden, found in 223 Fed. 726: (Reading.)

The COURT.—I will overrule the objection.

Mr. McMILLAN.—Note an exception. I move to strike [187] out all of the testimony of the witness so far as my client is concerned, and ask that it be limited only to those defendants which he has named.

The COURT.—The ruling on that would have to be made much later, but at this time, the Court, under the stand taken by the Court, will overrule the objection. I can see the possibility of that being reviewed at a later time.

Mr. McMILLAN.—May I note an exception, and have the privilege of renewing this motion?

The COURT.—The record will so show.

Mr. SWEENEY.—Q. Now, Mrs. Beans, would you tell us the conversation that you had with Mr. Kassmir in his office at the Mills Building when Mr. Cromwell Simon was present?

Mr. McDONALD.—Objected to on behalf of the defendant Kassmir, that it is immaterial, irrelevant, and incompetent, and not within the issues laid in the indictment.

The COURT.—Overruled.

Mr. McDONALD.—Exception.

Mr. HARRIS.—We adopt the objection made by Mr. McDonald.

The COURT.—The same ruling.

Mr. HARRIS.—Exception.

A. Mr. Kassmir explained to me about the business, how, in buying the stock, it was the partial payment plan, and that it would make it easier for me, and they could earn money, and I would not have to put in very much money, and in three months probably I could sell them and make quite a bit, and I finally consented to let it go on, and it went on.

Mr. SWEENEY.—Q. Mrs. Beans, was anything

said at that time with reference to the purchase of Studebaker stock?

A. Yes; they claimed they had already purchased it from me.

Only a few days after this Mr. Randolph and Mr. Kassmir [188] came to my home on Birch Court; I could not tell you the date, but it must have been in April, because as I say, I have tried to forget those things. Mrs. Durham, my niece, was present at the conversation at this time. Possibly, Mrs. Durham had been present at previous conversations had with these people, but I don't remember that they had ever been over before together.

VII.

That the Court erred in admitting in evidence certain testimony over the objection of defendants, as will more fully appear as follows:

Q. On that occasion, what was the substance of the conversation?

Mr. McGEE.—Objected to on behalf of the defendant Orton Goodwin, on the ground it is immaterial, irrelevant, and incompetent, and hearsay.

The COURT.—Overruled.

Mr. McGEE.—Exception.

Mr. McMILLAN.—That objection and exception is adopted by the defendant Robinson.

The COURT.—The same ruling.

We borrowed $2,500.00 at the back; we talked it all over together about the borrowing money; whether they just said, "Go ahead and do it," or what, I don't know, or whether we said we would

do it, we did it. We borrowed $2,500.00, and instructed them to buy Studebaker with it.

VIII.

That the Court erred in admitting in evidence certain testimony over the objection of defendants, as will more fully appear as follows:

Mr. SWEENEY.—Q. How did you borrow that $2,500?

Mr. McGEE.—Objected to as immaterial, irrelevant, and [189] incompetent.

Mr. McMILLAN.—I adopt the objection.

The COURT.—Overruled.

Mr. McMILLAN.—Exception.

(That the evidence admitted over the foregoing objection and under the ruling of the Court is fully set forth in the bill of exceptions (Exception No. 8) filed herewith, to which special reference is hereby made as the same is made a part hereof.)

IX.

That the Court erred in admitting in evidence certain testimony over the objection of defendants, as will more fully appear as follows:

Mr. SWEENEY.—Q. What was the conversation, Mrs. Beans?

Mr. McMILLAN.—On behalf of the defendant Robinson I object to this testimony upon the ground that it is incompetent, that it is hearsay, that it is a transaction had between strangers, it is too remote, and it does not in any way, shape, or form show that Mr. Robinson was engaged in any joint enterprise or in any conspiracy, or in any manner, shape, or form aided, abetted, or assisted any of

the defendants charged in the indictment, and that this testimony sought to be elicited, as well as all previous testimony elicited from this witness, is not within any count of the indictment before the Court.

The COURT.—The objection is overruled.

Mr. McMILLAN.—Exception.

Mr. Kassmir tried to have her get money from the east, and I would not want to use the words that he used, because she was not willing to pull her money out back east and bring it out here and place it with them and buy stock. Mr. Randolph was present. He tried to argue the point with her, and told her what [190] all he could do for her if she would bring her money here. He said he would build it up very wonderfully, made good promises, I could not tell definitely just what promises he made, but he made good promises about what he could do for her. I know Miss Durham did bring some money from the east; but I don't think I could tell approximately how much. She turned the money over to Mr. Kassmir to buy stock, and he was trying to look up something, that he felt very sure would go up, and at the same time he said, as he was putting it, he was keeping it up his sleeve quite a while, but bye-and-bye he would be ready to purchase the stock. They got the money, but I couldn't say how much.

X.

That the Court erred in admitting in evidence certain testimony over the objection of defendants, as will more fully appear as follows:

Mr. SWEENEY.—Q. To return, Mrs. Beans, to the conversation you had with reference to the $2,500 incident; you recall that?

A. Yes.

Q. Can you remember any specific thing that Mr. Randolph said upon that occasion?

Mr. McGEE.—Objected to on the behalf of the defendant Goodwin on the ground it is immaterial, irrelevant, and incompetent, and not responding to any allegations in the indictment, and hearsay.

Mr. HARRIS.—We adopt the objection on behalf of the defendant Randolph.

Mr. McMILLAN.—We adopt that objection on behalf of the defendant Robinson.

The COURT.—Overruled.

Mr. McGEE.—Exception. [191]

Mr. HARRIS.—Exception.

Mr. McMILLAN.—Exception.

(That the evidence admitted over the foregoing objection and under the ruling of the Court is fully set forth in the bill of exceptions (Exception No. 10) filed herewith, to which special reference is hereby made as the same is made a part hereof.)

XI.

That the Court erred in admitting in evidence certain testimony over the objection of defendants, as will more fully appear as follows:

Just prior to that time, did you have another conversation with Mr. Randolph and Mr. Kassmir with reference to your stock.

Mr. McMILLAN.—That is objected to on behalf

of the defendant Robinson on all of the grounds heretofore stated, and for the same reasons.

The COURT.—Overruled.

Mr. McMILLAN.—Exception.

Mr. SWEENEY.—Q. You may answer.

A. There came a time when the stocks were sort of hanging low, and so they came to us and wanted us to give up our stock, that is, let them use the money—they did not have any stocks, never did have—and let them use the money, and they would give us—they could use it to good advantage in their business, and they would give us $200 a month while they used it, and then when the stock got good, then they would put it back in the stock. They took our money and they paid us $200 a month for two months, and that was when the bank sprung up. So I was very anxious to have a little more than what I had, and offered to put a mortgage on my home of $4,000.

XII.

That the Court erred in admitting in evidence certain testimony over the objection of defendants, as will more fully [192] appear as follows:

Mr. SWEENEY.—Q. Would you please tell us the conversation you had with Mr. Randolph and Mr. Kassmir relative to the mortgage on your house?

Mr. McGEE.—Objected to on behalf of the defendant Goodwin on all of the grounds heretofore stated.

Mr. McMILLAN.—The objections urged are adopted by the defendant Robinson.

The COURT.—I will overrule the objection.

Mr. McMILLAN.—Exception.

Mr. Kassmir said he would look after it for me, would take charge of it, and look after it, and he got it fixed up in Mr. Robinson's office, and we went there.

Mr. SWEENEY.—Q. Before you go there, will you tell us what conversation you had with these men when the subject of a $4,000 mortgage was broached?

A. They were very pleased over it; I cannot just tell the words that were used.

Q. When you say they were very pleased, who have you reference to?

A. Mr. Kassmir and Mr. Randolph. Where we saw one we saw the other.

I mortgaged my home at that time. The papers relative to that mortgage were drawn up in Mr. Robinson's office and I went there and signed it. He was present. It was all ready for me to sign; I believe he did it, but I don't know who did it, but they were all ready to sign. I actually got the $4,000, from a broker over in Oakland; and paid it over to Kassmir and Randolph.

XIII.

That the Court erred in admitting in evidence certain testimony over the objection of defendants, as will more fully appear as follows:

Q. Up to this time, Mrs. Beans, how much money had you and Miss [193] Durham given to Mr. Randolph or Mr. Kassmir, if you know, of your own knowledge?

Mr. McGEE.—I object to the question on behalf of the defendant Goodwin on all of the grounds stated in the previous objection.

Mr. McMILLAN.—I adopt the objection on behalf of the defendant Robinson.

Mr. HARRIS.—And on behalf of the defendant Randolph.

The COURT.—The objection is overruled.

Mr. McMILLAN.—Exception.

Mr. HARRIS.—Exception.

A. Between us, my niece, Miss Durham, and myself, we put in $12,056 into what they called their Reno bank.

XIV.

That the Court erred in admitting in evidence certain testimony over the objection of defendants, as will more fully appear as follows:

Mr. SWEENEY.—That is all with this witness at this time, your Honor.

Mr. McGEE.—Before any questions are asked of the witness on cross-examination, I move on behalf of the defendant Goodwin that the entire testimony of this witness be stricken from the record on the grounds previously outlined to your Honor.

Mr. SWEENEY.—We expect to connect it up with Mr. Goodwin.

The COURT.—The objection will be overruled.

Mr. McGEE.—Exception.

Mr. McMILLAN.—May we have the benefit of that motion and your Honor's ruling?

The COURT.—The same ruling.

Mr. McMILLAN.—We respectfully note an exception, your Honor. [194]

XV.

The Court erred in denying the motion of said defendants to strike out certain testimony, as will more fully appear as follows:

Mr. McGEE.—I move to strike from the record, on the grounds previously stated, first, that this lady, according to her testimony, parted with whatever value she parted with not on the basis of any letters received by her through the mail, but on the oral representations of Randolph and Kassmir, and that there is nothing in the testimony of this witness pointing to the allegation of the indictment that the mails were used to defraud; whether she was defrauded actually, or not, is not a question for this court. The question before this court and jury is whether she was defrauded through the use of the mails, and, according to the testimony of this witness, she was not defrauded by the use of the mails, but if she was defrauded at all it was by the oral representation made by Kassmir and Randolph; on the further ground, if your Honor please, in so far as the defendant Goodwin is concerned, that the testimony is hearsay, immaterial, irrelevant, and incompetent.

Mr. McMILLAN.—As to the defendant Robinson, we join in that motion in all respects.

Mr. HARRIS.—And the defendant Randolph joins in it, except as to the third specification.

The COURT.—It will be overruled.

Mr. HARRIS.—Exception.

Mr. McMILLAN.—Exception.

XVI.

That the Court erred in admitting in evidence certain testimony over the objection of defendants. as will more fully appear as follows: [195]

Mr. SWEENEY.—Q. I will show you this and ask you if you can identify it.

A. I recognize it.

Mr. SWEENEY.—You are familiar with these, Mr. Harris?

Mr. HARRIS.—Those are the agent's licenses?

Mr. SWEENEY.—Yes, issued under the Cromwell Simon brokerage license.

Mr HARRIS.—Yes, I have seen them.

Mr. SWEENEY.—At this time I want to offer in evidence as one exhibit the application of J. W. Randolph for authority to act as broker's agent, and the order, both of which are dated April 20, 1925, also a similar document for Orton E. Goodwin, J. Edward McClintock and W. Claude Owen.

Mr. McMILLAN.—On behalf of the defendant Robinson, I object to the introduction of these documents in evidence on the ground that there has been no showing whatever concerning his knowledge of the matters therein contained, they are in no way binding upon him, and, therefore, are incompetent as to him.

The COURT.—The objection is overruled.

Mr. McMILLAN.—Exception.

XVII.

That the Court erred in admitting in evidence

certain testimony over the objection of defendants, as will more fully appear as follows:

Mr. SWEENEY.—Q. I will show you this, here, and ask you if you can identify that, Mr. Ellis (exhibiting to witness a document purporting to be a revocation of the license of Cromwell Simon & Co.).

A. I recognize that, yes.

Mr. SWEENEY.—At this time I wish to introduce this particular document in evidence. I think you, Gentlemen, are familiar with it.

Mr. McMILLAN.—Objected to on behalf of the defendant [196] Robinson on the ground that so far as he is concerned the proper foundation has not been laid, that it is hearsay, and incompetent.

Mr. HARRIS.—The same objection on behalf of the defendant Randolph, and the further objection that it is in no way binding upon him.

Mr. SWEENEY.—We will connect it up later on.

Mr. HARRIS.—Do I understand it is part of the case to have the license revoked?

Mr. SWEENEY.—No, it is not to have it revoked. It is part of this case to have it continued in force.

Mr. HARRIS.—The point I make is that no implication should be transferred to my client by the fact that Cromwell Simon & Company had their license revoked, and, therefore, it is immaterial, irrelevant, and incompetent as to him, and no foundation has been laid as to him.

The COURT.—I do not believe there has been any foundation laid to place it in evidence, even if

it was revoked. There is nothing to indicate they had notice of it. I think it can be received only for identification.

Mr. SWEENEY.—If a part of the scheme is to maintain the license of Cromwell Simon any effort made by them to retain that license is admissible in evidence, it is part of the *res gestae,* it is part of the whole scheme to defraud.

The COURT.—Do I understand that you hope to show that it was revoked, and that there was an attempt made later—

Mr. SWEENEY.—Not only that, but after that date—

The COURT.—Just a minute. Answer my question. Do I understand then you want to introduce the facts, if it is a fact, that there was a revocation, and subsequently they tried to have it set aside; is that what you are trying to show?

Mr. SWEENEY.—Yes. I will ask Mr. Ellis a question. [197]

Q. Mr. Ellis, was a copy of that mailed to the applicants? A. It was mailed.

The COURT.—I will sustain the objection. I cannot see the bearing of this document upon any possible issue in this case, unless it was brought to the knowledge of individuals involved. I do not think you have built up circumstantially, or by direct evidence, yet, that it was.

Mr. SWEENEY.—If it was mailed to the people interested, the presumption is it was received.

The COURT.—If it had been dropped into the postoffice box, I would concede your position.

Mr. SWEENEY.—If it had been mailed in the ordinary course of business conducted by a big organization or a big concern, it would be.

Mr. McGEE.—If you were attempting to prove the mailing of notices at the time of the probate of a will, or something of that kind, you would have to come in with an affidavit of the person mailing the notice; that is the only way you could prove it, by the person who mailed it. I submit that it is not admissible in evidence for two reasons previously stated, and on the further ground that no foundation has been laid that it was ever brought to the attention of the defendants, or of either of them.

The COURT.—I will sustain the objection. It will be received for identification.

Mr. SWEENEY.—Is the reason that it is not received in evidence because the Government has not yet proved it was properly mailed?

The COURT.—It has not been proved that it was properly mailed, or that it had come to the attention of the defendants.

Mr. SWEENEY.—In the record so far we have a decree by [198] Judge Deasy setting aside the injunction granted against the Corporation Commissioner for revoking their license, so we have already covered in the record that it must have been brought to their attention.

Mr. HARRIS.—It is still not brought to the attention of Randolph.

Mr. McGEE.—Nor brought to the attention of the defendant Goodwin.

The COURT.—I think that is a good point. The

objections heretofore made will be overruled, and it will be received in evidence.

Mr. McGEE.—Is it in evidence for all purposes against all the defendants—against the defendant Goodwin?

The COURT.—The Court has not made any exception in the ruling.

Mr. McGEE.—We note an exception.

Mr. HARRIS.—We note an exception as to the defendant Randolph.

Mr. McMILLAN.—And we note an exception as to the defendant Robinson.

(The document was marked U. S. Exhibit 7.)

XVIII.

That the Court erred in admitting in evidence certain testimony over the objection of defendants, as will more fully appear as follows:

Mr. SWEENEY.—Q. Mr. Ellis, you personally held this hearing on which this particular decree was predicated?

A. I personally conducted the hearing.

Q. Who was present at that hearing of the defendants, if you know?

A. Cromwell Simon and Harry M. Kassmir.

Q. At that hearing which one of the defendants took the stand? [199]

A. Cromwell Simon took the stand.

Q. Were certain exhibits offered by him in evidence at that time? A. There were.

Q. At this time I will show this letter and ask you if you can identify it. A. I do.

Q. When did you see that for the first time?

A. That was filed at that hearing.

Q. By whom?

A. March, 1925, by Cromwell Simon & Co.

Mr. SWEENEY.—At this time I ask that this be introduced in evidence and if it is accepted I will read it later.

Mr. McGEE.—Objected to on behalf of the defendant Goodwin on the ground that it is not binding on him, immaterial, irrelevant and incompetent, hearsay, secondary evidence, it not having been shown that Goodwin knew anything about its contents, no foundation has been laid.

Mr. SWEENEY.—It purports to be a financial statement of that concern on a particular date, filed by Cromwell Simon, in the presence of Harry M. Kassmir, at a hearing held by the Corporation Commissioner.

Mr. McMILLAN.—Held at what date?

Mr. SWEENEY.—On the date that Mr. Ellis testified to.

Mr. HARRIS.—It appears to be a summary of certain books, and nothing is shown that the defendant whom I represent, or any of the other defendants, had particular access to those books, or had the care or control of those books. That was exactly the point upon which the Doble case was reversed by the Supreme Court. They attempted to introduce a résume of certain books just as they are doing here, and Judge Preston at that time held that by implication you could not hold a person responsible in that sort of fashion. If your Honor please, I have the decision here. [200]

The COURT.—I understand that, but I do not believe that it would support the defendants in this case.

Q. Who presented that at the hearing in behalf of the Cromwell Simon Company?

A. It was presented by both sides; it was stipulated by Cromwell Simon and Harry Kassmir that it might be used by both sides.

Q. Who spoke for the company?

A. Cromwell Simon, in that case.

Mr. HARRIS.—If your Honor please, with your Honor's permission I move to strike out the statement of the witness in response to your Honor's question on the ground that it is his conclusions, and not the best evidence, the record of the hearing being the best evidence.

The COURT.—Overruled.

Mr. McMILLAN.—We desire to adopt the objection of Mr. Harris, on behalf of the defendant Robinson.

Mr. SWEENEY.—At this time I offer it in evidence but I will not read it until later on.

Mr. HARRIS.—Exception.

XIX.

That the Court erred in admitting in evidence certain testimony over the objection of defendants, as will more fully appear as follows:

Mr. SWEENEY.—At this time I offer these purchase agreements in evidence, signed by L. M. McClintock.

Mr. McMILLAN.—On behalf of the defendant Robinson, the offer is objected to on the ground

the proper foundation has not been laid as to him, incompetent, irrelevant, not within the issues of this case, and hearsay as to him; and these purported agreements deal with a time when, as the defendant Robinson, under no possible theory of this case, would he be bound by these documents, or any of them. [201]

Mr. HARRIS.—On behalf of the defendant Randolph, I adopt the objection of the defendant Robinson.

The COURT.—You offer these as showing the activities of these men at that time?

Mr. SWEENEY.—Yes, and that they were subsequently adopted by Mr. Robinson when he entered into the scheme.

The COURT.—You also believe that the activities of this firm were for the purpose of this design?

Mr. SWEENEY.—It was the scheme, part of the scheme.

Mr. McMILLAN.—I ask that the statement of the District Attorney, when he subsequently entered the scheme, be stricken out, as there is no proof whatever he ever entered into any scheme.

The COURT.—The statements of counsel are not evidence, no matter what counsel may say, unless it is stipulated to. I will overrule the objection.

Mr. McMILLAN.—Note an exception.

Mr. HARRIS.—Note an exception.

(The purchase agreements are marked U. S. Exhibit 9.)

During that hearing I interrogated Mr. Cromwell

Simon concerning these purchase agreements. [202]

XX.

The Court erred in admitting in evidence certain testimony over the objection of the defendants as will more fully appear as follows:

Mr. SWEENEY.—Q. Purchase agreement No. 1, "Herewith find money order or check for, as collateral, to apply as first payment on 100 shares of General Motors, Market, 100 shares of Studebaker, Market,"—I will ask you if you asked Mr. Cromwell Simon whether those stocks were bought, the date of that being February 25, 1925.

Mr. HARRIS.—We object to that as leading and suggestive, irrelevant, and immaterial, and not binding upon the defendant Randolph.

Mr. McMILLAN.—The defendant Robinson joins in the objection.

The COURT.—Overruled.

Mr. HARRIS.—Exception.

Mr. McMILLAN.—Exception.

Mr. SWEENEY.—Q. Do you have a record of that hearing in your hand?

A. I have.

Q. You have refreshed your memory from that record? A. I have.

Q. What was the answer of Cromwell Simon with reference to the purchase agreements?

A. That they had not purchased them.

Mr. HARRIS.—That is objected to as immaterial, irrelevant, and incompetent, hearsay, as far as the witness is concerned, because there is no foundation

laid showing that he made that memorandum, himself, and he testifies he refreshed his recollection from that memorandum, which is pure hearsay.

Mr. McMILLAN.—The same objection on behalf of the defendant Robinson.

The COURT.—Q. You have that in your hand. You just refreshed your memory?

A. I have not refreshed my memory recently [203] from this, but I recall and have read the transcript, however, in connection with this case.

The COURT.—The objection is overruled.

Mr. HARRIS.—Exception.

Mr. McMILLAN.—Exception.

Mr. SWEENEY.—Q. You have an independent recollection of this transaction, also? A. I have.

Q. I will show you a purchase agreement marked "3," which says, "Herewith find money order or check to apply as first payment on the following, 100 shares Marland Oil, market." Do you recall asking Mr. Cromwell Simon at that time whether those shares were bought?

Mr. HARRIS.—We also object on the same grounds on behalf of the defendant Randolph.

Mr. McMILLAN.—The same objection on behalf of defendant Robinson.

The COURT.—Overruled.

Mr. HARRIS.—Exception.

Mr. McMILLAN.—Exception.

A. Yes, we interrogated Cromwell Simon with regard to each one of these six, and to each one he replied that they had not purchased the security.

(That the evidence admitted over the foregoing objection and under the ruling of the Court is more fully set forth in the bill of exceptions (Exception No. 20) filed herewith, to which special reference is hereby made as the same is made a part hereof.)

XXI.

The Court erred in admitting in evidence certain testimony over the objection of the defendants as will more fully appear as follows: [204]

Q. Did Mr. Simon, at the date of that hearing, tell how much money he had taken out as his part of the profits of Cromwell Simon & Co.?

Mr. HARRIS.—Objected to on behalf of the defendant Randolph as leading and suggestive, and the grounds stated in the other objection. (Immaterial, irrelevant, and incompetent, and not binding upon him.)

Mr. SWEENEY.—The statement I was about to make is this, the contention of the Government is that the attempt of Cromwell Simon and Mr. Kassmir to continue their license in effect by the opposition to this hearing is a part of the scheme, because we state in the indictment that the obtaining and acting of Cromwell Simon & Co. under a broker's license is part of the scheme.

Mr. HARRIS.—Our contention is that in order to do that the Government does not have to lead as adept a witness as this, that he can relate what was said and done without suggestions from counsel.

The COURT.—The objection is overruled.

Mr. HARRIS.—Exception.

Mr. McMILLAN.—Exception.

A. Mr. Cromwell Simon did state the amount of money he had taken out of the business, yes.

(That the evidence admitted over the foregoing objection and under the ruling of the Court is more fully set forth in the bill of exceptions (Exception No. 21) filed herewith, to which special reference is hereby made as the same is made a part hereof.)

XXII.

The Court erred in admitting in evidence certain testimony over the objection of the defendants as will more fully appear as follows: [205]

Mr. SWEENEY.—At this time I want to offer in evidence the application for Broker's certificate of J. W. Randolph, doing business as Charles Wesley Company.

Mr. McGEE.—As far as the defendant Goodwin is concerned, we object to that as immaterial, irrelevant, and incompetent, hearsay, on the further ground that it is not responsive to any of the allegations of the indictment; there is nothing said in this indictment about Wesley Company. The only names they mention are Cromwell Simon & Cromwell & Co. There is nothing said about the Wesley Company, and we object to it as not responsive to any allegations of the indictment.

Mr. McMILLAN.—The defendant Robinson joins in the objection, and also that the proper foundation has not been paid.

Mr. SWEENEY.—The position of the Government is this, that when Cromwell Simon Company ceased to function, they started in business as

Charles Wesley Company, and continued to do business.

Mr. HARRIS.—Q. Where was that?

Mr. SWEENEY.—In Los Angeles.

Mr. McGEE.—But this crime is charged in the Northern District of California.

Mr. SWEENEY.—The scheme, however, Mr. McGee, might go through the whole country.

Mr. McGEE.—I object to that as immaterial, irrelevant, and incompetent, not responsive to any of the allegations in the indictment.

The COURT.—In other words, you are going to follow it up further than Cromwell Simon & Company?

Mr. SWEENEY.—Yes, we are going to show that they conducted business as Charles Wesley Company, operating from 1403 Hobart Building, where we are going to leave the Cromwell Simon Company, and there on the same date that they were put out of business by [206] the Superior Court of the City and County of San Francisco, they started in business as Charles Wesley Company.

Mr. McGEE.—This indictment charges that within the State and Northern District of California, Southern Division, the crime of using the mails to defraud was committed. They are going down to Los Angeles, now, which is another district, not in this district, and from there, according to the letter that they have attached to the indictment, they are going up to Seattle. In other words, any place they find Simon or Kassmir doing business under any name, in this district or some other

district, they are going to trail him around all through the dealings; I submit, if your Honor please, that the indictment charges this crime was committed in the Northern District of California, and if they subsequently organized a business down in Los Angeles, or Seattle, it is not material.

The COURT.—The whole question is whether it is one common scheme, and the question is to make the connection. I agree with counsel if the connection is not made to show it is all one scheme or course of conduct on the part of the defendants, if the evidence does not connect it up it will not be proper. I will overrule the objection.

Mr. McGEE.—Note an exception.

Mr. HARRIS.—Note an exception.

Mr. McMILLAN.—Note an exception.

(The document was marked U. S. Exhibit 10.)

XXIII.

The Court erred in admitting in evidence certain testimony over the objection of the defendants as will more fully appear as follows:

Mr. HARRIS.—Now, if your Honor please, I make the motion that the testimony be stricken out on the ground that it is a [207] privileged communication.

The COURT.—Q. You also wrote personal letters outside of the business letters while you were there? A. Not that I remember.

Q. You never wrote a personal letter?

A. I do not just remember any personal letters.

Q. They always related to business? A. Yes.

Q. He never wrote a letter that did not relate to some client? A. Not that I remember.

Q. The entire time that you were there?

A. No.

Mr. McGEE.—The defendant Goodwin joins in the motion to strike out the testimony.

Mr. McDONALD.—The defendant Kassmir joins in the motion.

Mr. McMILLAN.—And the defendant Robinson.

The COURT.—I think you ought to make some statement for the record, Mr. Sweeney.

Mr. SWEENEY.—I don't understand what the particular motion is.

Mr. HARRIS.—The motion is to strike out the testimony given by this witness from the record, on the ground it is a confidential communication.

The COURT.—On the ground it was procured in a confidential relationship.

Mr. SWEENEY.—As I understand the rule, not all information that is acquired while a person is a clerk or a secretary is confidential; for instance, the matter of signature is a matter in which a person might be able to raise the curtain of confidential communication and use it as a screen for committing crime. The privilege, itself, is a matter of the client. If Mr. Robinson's clients were here, or something of that character, complaining as to it—

The COURT.—The matter of obtaining information as to a [208] man's signature, in my opinion, is not a matter of confidential communication. The objection will be overruled.

Mr. HARRIS.—Exception.

Mr. McGEE.—Exception.

Mr. McMILLAN.—Exception.

Mr. McDONALD.—Exception.

Mr. HARRIS.—I desire to answer counsel's statement. I just want to call your Honor's attention to the section covering that very point, Section 1881 of the Code of Civil Procedure (reading).

The COURT.—It is not the opinion of the Court that that pertains to knowledge acquired of a person's handwriting. The ruling will stand.

Mr. HARRIS.—Note an exception.

Mr. McMILLAN.—Note an exception.

Mr. McDONALD.—Note an exception.

Mr. McGEE.—Note an exception.

(That the evidence admitted over the foregoing objection and under the ruling of the Court is more fully set forth in the bill of exceptions (Exception No. 23) filed herewith, to which special reference is hereby made as the same is made a part hereof.)

XXIV.

The Court erred in admitting in evidence certain testimony over the objection of the defendants as will more fully appear as follows:

Mr. SWEENEY.—If your Honor please, I will offer this in evidence as Government's exhibit next in order.

The COURT.—For identification, or in evidence?

Mr. SWEENEY.—In evidence, your Honor.

Mr. HARRIS.—That is objected to, as far as the defendant Randolph is concerned as being in no way binding upon him, a hearsay [209] transaction

between strangers to him, immaterial, irrelevant and incompetent.

Mr. McMILLAN.—The defendant Robinson joins in that objection.

The COURT.—The objection will be overruled.

Mr. SWEENEY.—It is part of the scheme, that is the Government's contention.

The COURT.—It will be received and marked next in order.

Mr. HARRIS.—Exception.

Mr. McMILLAN.—Exception.

(The *co*ument was marked U. S. Exhibit 12.)

Mr. SWEENEY.—I will read it. (Reading.)

XXV.

The Court erred in admitting in evidence certain testimony over the objection of the defendants as will more fully appear as follows:

Q. Now, Mrs. McClintock, let me have, please, the circumstances under which this agreement was entered into by you. Let me withdraw that question. I will ask you can you identify that.

A. Yes.

Q. What is that? That is your signature, is it not? A. Yes.

Mr. SWEENEY.—I ask that this be introduced in evidence as Government's Exhibit next in order.

Mr. HARRIS.—The same objection as made to the last exhibit.

Mr. McMILLAN.—We join in the objection.

The COURT.—The same ruling.

Mr. HARRIS.—Exception.

Mr. McMILLAN.—Exception.

(The document was marked U. S. Exhibit 13.)

(That the evidence admitted over the foregoing objection [210] and under the ruling of the Court is more fully set forth in the bill of exceptions (Exception No. 25) filed herewith, to which special reference is hereby made as the same is made a part hereof.)

XXVI.

The Court erred in admitting in evidence certain testimony over the objection of the defendants as will more fully appear as follows:

Q. What was the nature of the conversation you had with Mr. Kassmir at that time?

A. He was going down—

Mr. HARRIS.—That is objected to as calling for the conclusion of the witness, what the nature of it was, and no proper foundation has been paid as to the parties present.

Mr. SWEENEY.—Q. Who was present at that conversation,. Mrs. McClintock?

A. Mr. Kassmir.

Q. What was the conversation, what did Mr. Kassmir say?

Mr. McGEE.—That is objected to on behalf of the defendant Goodwin on the ground that it could not be binding on him, and because he was not connected with the concern in Los Angeles, he had no license connected with any enterprise in Los Angeles, he worked in San Francisco for three months, and after that had nothing to do with it; we object

to any conversation this lady had with anybody about any Los Angeles concern.

Mr. HARRIS.—I would like to add the further objection that it is incompetent, for the reason that it is the alleged relation of a co-conspirator after any conspiracy which might have existed had been consummated. This is now in September, 1925, at a time when this conspiracy terminated.

The COURT.—When do you fix the date that you can put in proof to?

Mr. SWEENEY.—There is an allegation in the indictment [211] that prior to the date of certain letters, and the last letter is somewhere in 1927, if I remember right.

The COURT.—Have you it on record, so that we can know?

Mr. SWEENEY.—Certainly there are letters in 1926.

The COURT.—I am just asking you what date you are contending that you can put in proof for, so that we can fix the date after which the declarations of a defendant will only appertain to himself and not to his associates.

Mr. SWEENEY.—March 8, 1927.

Mr. HARRIS.—Is it my understanding that it is counsel's contention that up to March, 1927—

Mr. SWEENEY.—March 8, 1927.

Mr. HARRIS.—(Continuing.) —the scheme had not until that time been consummated or completed: Is that it?

Mr. SWEENEY.—It was in operation up to that time.

Mr. HARRIS.—Of course, if counsel connects that up my objection may not be good.

The COURT.—That is why I wanted him to fix the date.

Mr. McGEE.—Now, do I understand that there is a date when this conspiracy is supposed to have ceased, or is it still in existence?

Mr. SWEENEY.—It was in existence up to March 8, 1927.

Mr. McGEE.—Not after that?

Mr. SWEENEY.—We do not contend it is in existence now.

The COURT.—Q. This date is what, that you are testifying to?

Mr. SWEENEY.—September, 1925, when he went to Los Angeles.

The COURT.—The objection will be overruled and the question allowed.

Mr. HARRIS.—We will note an exception, and reserve our [212] motion to strike out.

Mr. McMILLAN.—Exception.

Mr. SWEENEY.—Q. What was the nature of the conversation you had with Mr. Kassmir—what was the conversation you had with Mr. Kassmir at that time?

A. That he was going down to Los Angeles to open up a business to get away from the Corporation Department of San Francisco.

Q. Did he say who was going down with him?

A. Mr. Randolph.

XXVII.

The Court erred in admitting in evidence cer-

tain testimony over the objection of the defendants as will more fully appear as follows:

Q. What was the conversation you had at that time with Mr. Kassmir?

Mr. McGEE.—Objected to on behalf of the defendant Goodwin on the ground it is immaterial, irrelevant, and incompetent, hearsay testimony, and not binding on the defendant Goodwin, unless it is shown he was present at the time the conversation took place.

A. It was in August, 1925.

Mr. HARRIS.—That objection is adopted by the defendant Randolph.

Mr. McMILLAN.—Also by the defendant Robinson.

The COURT.—Overruled.

Mr. McGEE.—Exception.

Mr. HARRIS.—Exception.

Mr. McMILLAN.—Exception.

(That the evidence admitted over the foregoing objection and under the ruling of the Court is more fully set forth in the bill of exceptions (Exception No. 27) filed herewith, to which special reference is hereby made as the same is made a part hereof.) [213]

XXVIII.

The Court erred in admitting in evidence certain testimony over the objection of the defendants as will more fully appear as follows:

Mr. SWEENEY.—Q. I will ask you, Mrs. McClintock, if you can identify these letters.

A. Yes.

Q. From whom did you get them?

A. From Harry M. Kassmir.

Q. How did they come to you?

A. Through the mail.

Q. Do you know when you received them, in what year? A. 1926.

Q. 1926? A. Yes.

Mr. SWEENEY.—I would like to have these marked as Government's exhibit next in order, your Honor.

Mr. McGEE.—On behalf of the defendant Goodwin, I object on the ground they are immaterial, irrelevant, and incompetent, and hearsay, as far as Goodwin is concerned, he having severed his connection with this company on the 2d of July, 1925, and all of this transaction having taken place subsequent to that time.

Mr. McMILLAN.—We make the same objection as to the defendant Robinson.

The COURT.—Overruled.

Mr. McGEE.—Exception.

Mr. McMILLAN.—Exception.

Mr. HARRIS.—Objected to on the ground it is hearsay, incompetent, the proper foundation not having been laid.

The COURT.—I do not know, unless I see the letters, as to whether they do pertain to this matter, at all. (Reading.)

Q. Who is this "Harry"?

A. That is Harry M. Kassmir.

The COURT.—They will be received in evidence. The objection is overruled.

Mr. HARRIS.—Exception. [214]

Mr. McGEE.—Exception.

Mr. McMILLAN.—Exception.

(The document was marked U. S. Exhibit 14.)

XXIX.

The Court erred in denying motion of defendants to strike out certain testimony as will more fully appear as follows:

Mr. SWEENEY.—That is all from this witness at this time.

The COURT.—Any further questions?

Mr. McMILLAN.—I have no questions.

On behalf of the defendant Robinson we move to strike out all of the testimony of this witness upon the following grounds: First, that the testimony as against him is hearsay, the proper foundation has not been *p*aid, and there is no testimony showing that he ever authorized or sanctioned, or took any part in any statements or representations that were made, that he never authorized or sanctioned any of the letters that were sent through the United States mail and the transaction testified to by the witness, so far as he was concerned, was *res inter alios acta,* and there is no testimony showing that he ever made any statement or representation or sanctioned or authorized any representation made in furtherance either of a general plan or scheme to defraud, or of a general plan or scheme in furtherance of fraud to use the United States mails.

The COURT.—The objection is overruled.

Mr. McMILLAN.—Exception.

Mr. HARRIS.—The same objection on behalf of the defendant Randolph.

The COURT.—The same ruling.

Mr. HARRIS.—Exception.

XXX.

The Court erred in admitting in evidence certain testimony [215] over the objection of the defendants as will more fully appear as follows:

Q. I will show you this letter and ask you if you can identify that? A. Yes, I remember that.

Q. How did you get that letter?

A. I got it through the United States mails.

Mr. SWEENEY.—Any question about this signature?

Mr. McGEE.—No questions.

Mr. SWEENEY.—At this time I would ask that this letter be admitted in evidence as Government's exhibit next in order.

Mr. McMILLAN.—What is the date of that letter?

Mr. SWEENEY.—March 24, 1925.

Mr. McMILLAN.—We object to it on behalf of the defendant Robinson on the ground, as to him, it is too remote, hearsay, and the proper foundation has not been laid.

The COURT.—That is your only objection?

Mr. McMILLAN.—Yes.

The COURT.—I suppose there is no question about the signature?

Mr. McGEE.—No. We admit the signature, and have no objection on behalf of Goodwin.

The COURT.—And none of the other defend-

ants raise the question as to the signature? In other words, it is stipulated that is the signature of the party whose name is signed there?

The COURT.—Is there any question as to the signature?

Mr. McGEE.—No question as to the signature.

Mr. HARRIS.—I will stipulate that that is the signature of Mr. Goodwin.

The COURT.—Will both of you, Gentlemen, also do that?

Mr. McDONALD.—Yes.

Mr. McMILLAN.—Yes, my only point is that—[216]

The COURT.—I know the other points. Will you stipulate that is the signature?

Mr. McMILLAN.—Yes.

The COURT.—Under the circumstances it will be received and the objection overruled.

Mr. McMILLAN.—Exception.

(The document was marked U. S. Exhibit 18.)

(Which original exhibit is before this Honorable Court by stipulation and order.)

XXXI.

The Court erred in admitting in evidence certain testimony over the objection of the defendants as will more fully appear as follows:

Mr. SWEENEY.—I will show you this letter and ask you if you can identify it.

A. Yes, I remember that letter, too.

Q. How did you get it?

A. Through the United States mails.

Mr. SWEENEY.—Is there any question about the signature?

Mr. HARRIS.—I have no question about the signature.

Mr. McMILLAN.—I have none.

Mr. McGEE.—I have none.

Mr. McDONALD.—I have none.

Mr. SWEENEY.—At this time, if your Honor please, I offer in evidence the letter dated April 8, 1925, addressed to Mr. Johnson, Chualar, California, signed by Cromwell Simon Company, by Orton E. Goodwin.

Mr. McMILLAN.—Objected to on behalf of the defendant Robinson on the grounds previously stated in the objection made to the previous letter.

Mr. HARRIS.—Objected to on behalf of the defendant Randolph on the ground it is immaterial, irrelevant, and incompetent [217] as to him, not in any way binding upon him, they being entire strangers to him, and without any authorization shown.

The COURT.—The objection is overruled.

Mr. HARRIS.—Exception.

Mr. McMILLAN.—Exception.

(The document was marked U. S. Exhibit 19.)

XXXII.

The Court erred in admitting in evidence certain testimony over the objection of the defendants as will more fully appear as follows:

Q. I will show you this file and ask if you can identify these. A. Yes.

Q. How did you receive them?

A. Through the United States mail.

Mr. McGEE.—Does that include all of them?

Mr. SWEENEY.—The first four, they are all inclusive.

Mr. McGEE.—Does that include the enclosures?

Mr. SWEENEY.—Yes.

The COURT.—*Let* letters contain the enclosures, too, did they?

A. Yes.

Q. In the same letter?

A. I don't know whether they all came in the same letter, but they all came through the mail.

Mr. SWEENEY.—At this time I offer this file in evidence, which is Government's Exhibit No. 6 for identification.

Mr. McMILLAN.—On behalf of the defendant Robinson that is objected to, may it please your Honor, upon the ground that as to him it is too remote, hearsay, and the proper foundation has not been laid.

Mr. HARRIS.—As I understand it, it is for identification?

The COURT.—No, in evidence.

Mr. HARRIS.—We object to it on behalf of the defendant Randolph on the ground it has not been connected up with him or [218] shown to be the same transaction which was testified to as having been made with Mr. Randolph, not authorized by him.

The COURT.—I presume there is no question that it is the signature of the gentleman whose name appears at the end of the letter?

Mr. SWEENEY.—I think it has already been identified. It is one of the identified letters. It was identified, your Honor.

The COURT.—The objection will be overruled.

Mr. McMILLAN.—Exception.

Mr. HARRIS.—Exception.

(The document was marked U. S. Exhibit 20.)

XXXIII.

The Court erred in admitting in evidence certain testimony over the objection of the defendants as will more fully appear as follows:

Q. Mr. Johnson, I want to ask you how you got that letter.

A. I got it through the mail, the same as the others.

Mr. SWEENEY.—Is there any question about the signature?

Mr. McGEE.—Not at all.

Mr. HARRIS.—No question as to the signature.

Mr. SWEENEY.—I ask, if your Honor please, that the letter dated May 14, 1925, addressed to Mr. G. A. Johnson, signed by Cromwell Simon Company, Orton Goodwin, be admitted in evidence as Government's next in order.

The COURT.—Is there any question that that is the signature of the individual who signed it?

Mr. HARRIS.—No question of that.

The COURT.—Do any of the defendants' counsel question the signature?

Mr. McMILLAN.—No. [219]

The COURT.—I do not hear you say anything, Mr. McDonald.

Mr. McDONALD.—No, if your Honor please.

Mr. McGEE.—We admit that is his signature.

Mr. McMILLAN.—The defendant Robinson objects on the ground that it is too remote, hearsay, the proper foundation has not been laid.

Mr. HARRIS.—I do not question the signature appearing on the document, but I object on behalf of the defendant Randolph on the ground that no foundation has been laid, it is incompetent and especially irrelevant.

The COURT.—The objection will be overruled.

Mr. McMILLAN.—Exception.

Mr. HARRIS.—Exception.

(The document was marked U. S. Exhibit 21.)

XXXIV.

The Court erred in admitting in evidence certain testimony over the objection of the defendants as will more fully appear as follows:

Q. I will show you this letter, and ask you how you received that letter.

A. I received it through the United States mail.

Q. This refers to a letter of June 24. Have you a copy of that letter?

A. I have not, I don't think.

Mr. SWEENEY.—At this time I ask that this letter dated July 7, 1925, signed by J. W. Randolph, whose signature has already been identified, be offered as Government's exhibit next in order.

Mr. McGEE.—Objected to on behalf of the defendant Goodwin on the ground it is immaterial, irrelevant, and incompetent, hearsay, as far as he is concerned, in nowise binding upon him, unless

it is proved that the contents of the letter were brought to his attention. [220]

Mr. McMILLAN.—Defendant Robinson adopts that objection.

The COURT.—The objection is overruled.

Mr. McMILLAN.—Exception.

(The document was marked U. S. Exhibit 22.)

XXXV.

The Court erred in admitting in evidence certain testimony over the objection of the defendants as will more fully appear as follows:

Mr. SWEENEY.—Q. Mr. Johnson, I will ask you if you can identify that.

A. Yes, I remember that one well.

Q. When did you receive it? A. On May 18.

Q. How did you receive it?

A. Through the United States mail.

Mr. SWEENEY.—At this time, your Honor, I offer in evidence what purports to be a dividend notice signed by Cromwell Simon Company, per V. A. Parks.

Mr. McMILLAN.—Objected to on behalf of the defendant Robinson on the ground it is too remote, hearsay, and the proper foundation has not been laid.

Mr. HARRIS.—I adopt the objection of the defendant Robinson on behalf of the defendant Randolph.

The COURT.—Objection overruled.

Mr. HARRIS.—Exception.

Mr. McMILLAN.—Exception.

(The document was marked U. S. Exhibit 23.)

XXXVI.

The Court erred in admitting in evidence certain testimony over the objection of the defendants as will more fully appear as follows:

Mr. SWEENEY.—Q. I will ask you if you can identify that, Mr. Johnson.

A. I remember that one, too.

Q. How did you receive that, Mr. Johnson?

A. Through the mail. [221]

Mr. SWEENEY.—At this time I offer in evidence what purports to be a dividend notice dated August 17, 1925, and signed by Cromwell Simon Company, per V. A. Parks.

Mr. HARRIS.—On behalf of the defendant Randolph we object on the grounds previously stated as to the last dividend notice.

Mr. McMILLAN.—The defendant Robinson objects to it on the ground it is hearsay, incompetent and irrelevant, and the proper foundation has not been laid.

The COURT.—Objection overruled.

Mr. McMILLAN.—Exception.

Mr. HARRIS.—Exception.

(The document was marked U. S. Exhibit 24.)

(Which original exhibit is before this Honorable Court by stipulation and order and is the letter or payment notice set forth in the indictment as Exhibit "I.")

XXXVII.

The Court erred in admitting in evidence cer-

tain testimony over the objection of the defendants as will more fully appear as follows:

Mr. SWEENEY.—Q. I ask you if you can identify that.

A. Yes, I remember that.

The COURT.—How did you receive it?

A. Through the mails.

Mr. SWEENEY.—I offer it as Government's exhibit next in order.

Mr. HARRIS.—That is objected to on behalf of the defendant Randolph on the ground that there is no foundation laid, no showing that Randolph in anywise authorized the sending of it, or had anything to do with it in any way whatsoever, immaterial, irrelevant, and incompetent, and hearsay. [222]

Mr. McMILLAN. — The defendant Robinson makes the same objection.

The COURT.—All of these documents received through the mail you received on or about the date mentioned upon their face, did you?

A. Yes.

The COURT.—The objection is overruled.

Mr. McMILLAN.—Exception.

Mr. HARRIS.—Exception.

(The document was marked U. S. Exhibit 25.)

XXXVIII.

The Court erred in admitting in evidence certain testimony over the objection of the defendants as will more fully appear as follows:

Q. I will show you this check, Mr. Johnson, and ask you if you can identify that. A. Yes, I can.

Q. To whom did you mail that check, if you did mail it? A. To Cromwell Simon & Co.

Q. Where did you address the letter to?

A. To the building on Montgomery—the Mills Building, 220—I don't quite remember the address; I don't remember quite what address it was now; it was in the Mills Building, I think 220 Montgomery Street.

Mr. SWEENEY.—At this time I want to present in evidence a check signed by Gustave A. Johnson, dated November 3, 1925, payable to Cromwell Simon Company.

Mr. McGEE.—Objected to on behalf of the defendant Goodwin upon the ground it is immaterial, irrelevant, and incompetent, hearsay, and upon the further ground that it does not respond to any allegation contained in the indictment. There is no allegation in this indictment that anybody was defrauded of any money, there is no allegation in the indictment that anybody paid any money, and here is an attempt made to show that the money has [223] been paid when there is no allegation in the indictment to that effect.

Mr. McDONALD.—The defendant Kassmir joins in that objection.

The COURT.—I do not see the reason for putting it in evidence. He states he made the payment.

Mr. SWEENEY.—We want to show by this witness that he paid this check to Cromwell Simon & Company. On the accounts of Cromwell Simon & Company that check does not show up. We charge

in the indictment here it was part of the scheme and artifice to defraud that the defendant should take and convert such collateral securities to their own use and benefit.

The COURT.—My point is this, the witness on the stand testifies that he made such payment on or about that time. Now, why is it necessary to introduce the check? If the defendant should try to show it did not occur, that he had not sent that check at that time, then you could produce the check, but I don't see any necessity for putting the check in at this time.

Mr. SWEENEY.—There is the matter of endorsement on the back. We want to show that this specific money was specifically converted to the use of one of the defendants.

The COURT.—Q. Do I understand that you sent this check through the mails that Mr. Sweeney is holding in his hands, that he showed you?

A. Yes, through the United States mails.

Q. You got it back, I suppose, in your statement later? A. Yes, I got it back.

Q. That is all you know about the payment?

A. That is all I know.

Mr. HARRIS.—I would like to join in the objection that has already been made.

Mr. McMILLAN.—The defendant Robinson joins in the objection.

The COURT.—The objection is overruled.

Mr. McMILLAN.—Exception. [224]

Mr. HARRIS.—Exception.

Mr. McDONALD.—You will stipulate that that is not the signature of the defendant Kassmir?

Mr. SWEENEY.—I will so stipulate, it is not the signature of Harry M. Kassmir.

A. I never did get back my Di Giorgia stock nor my Standard Oil stock.

Mr. SWEENEY.—That is all from this witness at this time.

The COURT.—Now, Mr. Sweeney, you have made a concession that that is not the signature of Mr. Kassmir.

Mr. SWEENEY.—I will merely put it in, then, for the purpose of identification at this time.

(The check is marked U. S. Exhibit 41 for Identification.)

XXXIX.

The Court erred in admitting in evidence certain testimony over the objection of the defendants as will more fully appear as follows:

Mr. SWEENEY.—Q. Mrs. Christensen, you were employed in office 1403 Hobart Building during the latter part of 1925?

A. Yes.

Q. Did Mr. Kassmir ever give you any statements to send out at that time?

Mr. McDONALD.—That is objected to as immaterial, irrelevant, and incompetent. This witness has testified that she was a stenographer in the office of Mr. Kassmir's attorney, and all of her testimony would be privileged.

Mr. HARRIS.—I make the objection that it is an attempt to adduce a privileged communication

from this witness, which is not permitted by law, therefore immaterial, irrelevant, and incompetent.

Mr. McGEE.—I join in that objection.

Mr. SWEENEY.—Mr. Kassmir is not an attorney, at least [225] that much must be admitted.

Mr. HARRIS.—I have a direct decision upon the point, that even if the statement is made by the client through an agent of the attorney, for instance, an interpreter, whom it is necessary for him to communicate through, that the privilege extends, and it extends, of course, for the specific reason that he should be permitted to talk freely to him.

The COURT.—I think in this case the theory upon which the prosecution is working is that this is a case where an attorney was a party to the scheme, and went into it intentionally, and consequently, is one of the people in the design, and was not merely one who was consulted for protection in some transaction. The fact that he is an attorney at law does not make him any the less amenable to the charge of using the mails to defraud. I think it is along that line that counsel spoke of that English case.

Mr. HARRIS.—Now, it has been very plainly shown by the Government's testimony, in so far as Robinson is concerned, he came into it many months after—

The COURT.—Counsel is anticipating. I do not believe it is necessary for me to rule on it at this time, because I have the district attorney's as-

surance that it will be connected up, and the prosecution has not rested.

Mr. HARRIS.—I think a ruling should be made at this time, because after the testimony is given the damage will be done, and after two weeks' testimony here the jury will have difficulty in determining what is stricken out.

The COURT.—The prosecution cannot put in their evidence all at once; the case is being built up; it is a question for the Court finally as to whether it has been built up. There is no practical way of ruling to satisfy counsel's objection; the [226] Court cannot decide it until the testimony is in; from a practical standpoint, there is no way for the Court to rule on it now. When the prosecution rests we will know better what is in the record. Proceed, Mr. Sweeney.

Mr. SWEENEY.—Answer the question.

A. Would you ask it again?

Mr. HARRIS.—Does your Honor overrule the objection?

The COURT.—I overrule the objection.

Mr. HARRIS.—Exception.

Mr. McMILLAN.—Exception.

Mr. McGEE.—Exception.

Mr. McDONALD.—Exception.

(That the evidence admitted over the foregoing objection and under the ruling of the Court is more fully set forth in the bill of exceptions (Exception No. 39) filed herewith, to which special reference is hereby made as the same is made a part hereof.)

XXXX.

The Court erred in admitting in evidence certain testimony over the objection of the defendants as will more fully appear as follows:

Mr. SWEENEY.—At this time I want to offer in evidence both the letter written by Judge Bardin and the answer thereto, as Government's exhibit next in order.

Mr. McGEE.—Objected to as immaterial, irrelevant, and incompetent, not binding on the defendant Goodwin, being hearsay, unless it appears that he was informed of its contents.

Mr. HARRIS.—The same objection on behalf of the defendant Randolph.

Mr. McMILLAN.—And also on behalf of the defendant Robinson. [227]

The COURT.—I suppose you are raising no issues as to whether it was deposited in the United States mail?

Mr. McDONALD.—No.

The COURT.—The objection is overruled, and it will be received in evidence.

Mr. HARRIS.—Exception.

Mr. McDONALD.—Exception.

Mr. McMILLAN.—Exception.

(The document was marked U. S. Exhibit 26.) [228]

EXCEPTION No. 41.

The Court erred in admitting in evidence the testimony of Mr. Pike, an attorney at law, in Reno, Nevada, and exhibits introduced in connection therewith, the objections to which were primarily

directed to the claim that the communications testified to were privileged and all of which objections and the rulings made will be hereinafter fully set forth at length and all of which rulings are hereby specifically under this number assigned as error.

Leroy F. Pike, an attorney at law, in Reno, Nevada, called as a witness on behalf of the Government, testified that he knew the defendant Robinson and had met him a couple of times, and knew the defendant Kassmir and met him once, and met the defendant Simon once.

Thereupon the following proceedings were had: [229]

Mr. McDONALD.—May it please the Court, at this time, slightly out of order, I would like to ask permission to examine Mr. Pike as to his connection with the defendants. I believe it will be clearly shown he met them as an attorney in the exercise of his practice, and that all communications between Mr. Pike and these defendants are privileged.

Mr. NAUS.—We will consent to the examination out of order, if your Honor please, and we would like, as soon as the examination is concluded, to argue this question as to the admissibility of the evidence, not only as to this matter, but as to any other matter where this question of privileged communication existed, and clear that up. Go ahead, Mr. McDonald.

The COURT.—Proceed, Mr. McDonald.

Mr. McDONALD.—Q. You are an attorney at law?

A. Yes.

Q. Duly licensed to practice under the laws of the State of Nevada? A. Yes.

Q. In that capacity, you were representing Mr. Kassmir?

A. I represented Mr. Robinson more, I think.

Q. You represented Mr. Robinson and Mr. Kassmir?

A. When they formed the corporation I performed the services of forming the corporation for them.

Q. All of your correspondence and all of your meetings with Mr. Kassmir and Mr. Robinson were in the course of the formation of this corporation?

A. Well, first in connection with the formation of the corporation, and thereafter I received communications from Mr. Robinson concerning certain matters connected with the corporation.

Q. Concerning the affairs of the corporation?

A. Yes.

Q. You were and considered yourself as attorney for that corporation?

A. I believe that I was acting in that capacity.

Q. You were acting in your professional capacity? A. Yes. [230]

Mr. McDONALD.—We object, if your Honor please, to any testimony of this witness, on the ground that it is a privileged communication between attorney and clients, and respectfully suggest that this witness cannot testify to anything that occurred between them. When I speak of his clients, I mean Mr. Kassmir and Mr. Robinson.

The COURT.—You are representing Mr. Kassmir?

Mr. McDONALD.—Yes.

The COURT.—As I understand it, you are objecting to his testifying?

Mr. McDONALD.—Yes.

Mr. NAUS.—Before ruling on the objection, and before the argument on the objection, I would like to ask two or three questions, with your Honor's permission.

The COURT.—Very well.

Mr. NAUS.—Q. Mr. Pike, in addition to being an attorney at law at Reno, Nevada, practicing your profession there, you also run the business of incorporating companies, do you not, incorporating corporations in that state?

A. Yes.

Q. Mr. Pike, in the State of Nevada, there are a considerable number of individuals and corporations who are engaged in the business of incorporating under the laws of Nevada corporations for persons who make requests from other states?

A. That is true.

Mr. NAUS.—Q. Among the individuals and companies that incorporate in Nevada corporations at the request of those from other states, you are one of the persons who, as an individual, is engaged in that business: Isn't that correct?

A. I have no corporation, that is, no incorporated business.

Q. You have no incorporated company, Mr. Pike, but, for a number of years, you have followed

that business at Reno, Nevada, of incorporating corporations there under the laws of Nevada, upon such requests [231] as you might receive from other states? A. That is true.

Q. You follow the business, and have for years followed the business, have you not, of incorporating corporations under the laws of Nevada, upon requests from other states?

A. I would like to answer that question and make an explanation as to what I did.

Mr. NAUS.—Q. Let us have both, first the answer.

A. I don't know as I can answer without qualifying it, by an answer "Yes" or "No." I am an attorney at law, at least pretend to be, and, in the course of my business, I incorporate companies. Many of those companies come from other states, most of them, as a matter of fact. Frequently, in the incorporating of those companies, I act as resident agent for the company that I organize, and in that capacity I would not act as an attorney at law, but in the other capacities it is purely a matter of legal procedure in the organization of the corporation.

Mr. NAUS.—Q. Now, Mr. Pike, is it not a fact that in the incorporation of a corporation known as Cromwell & Co., Inc., that you attended within the space of 24 or 48 hours to the actual incorporation of that company, and you did not at any single time give any advice to any of the defendants in connection with it?

A. Well, I really could not tell you that, Mr. Dis-

trict Attorney, only to this extent: It is indistinct in my memory as to just what we did. I don't know whether they prepared articles of incorporation, themselves, and brought them to my office, or whether they were prepared in my office. To continue with my answer, if it will be all right—

Mr. McDONALD.—To which we object as immaterial, irrelevant, and incompetent, and a privileged communication.

Mr. HARRIS.—I have not objected to that answer, but I object to any additional answer. [232]

The COURT.—In other words, you are not willing for this witness to explain the statement he has heretofore given?

Mr. HARRIS.—I am not willing to have this witness testify at all if his relations were those of attorney and client, and the cases very distinctly so hold.

The COURT.—Let us not go into that point. The witness has already, without objection from defendants, testified to a certain point. Now, all he is asking to do is to explain the answer. You do not object to the answer he has given up to this point?

Mr. HARRIS.—I am objecting to any testimony concerning this, on the ground it is privileged.

The COURT.—I will overrule the objection.

Mr. HARRIS.—Exception.

A. As I said, I don't know, I don't remember whether or not they prepared the articles of incorporation and brought them to my office, or not—I do not remember just exactly what the procedure

was upon that occasion. I do remember that these gentlemen came to my office, and that I proceeded to organize a corporation for them, doing certain things in connection therewith which I might consider to be the services of an attorney, and which you might not.

Mr. NAUS.—Perhaps you and I might differ on that, and the Court might differ on that.

A. Yes.

Q. Your business with them was conducted mainly by correspondence, was it, Mr. Pike?

A. All business except one meeting.

Q. I hand you what is marked Exhibit 33 for Identification, and ask you if you recall having received that in the mails, at about the date it bears date, from Mr. Robinson.

Mr. HARRIS.—At this time, if your Honor please, we object to the witness testifying as to whether he received any letter, he having testified that all of this business in connection with this transaction was in his capacity as attorney at law. [233]

The COURT.—I am presuming that the District Attorney's theory is that he is going to either prove Mr. Pike as one of the parties to the design, with the knowledge that it would be necessary for him to have, or he is endeavoring to show that despite the statement already made by the witness that he was employed entirely in the capacity of an attorney at law, that, as a matter of fact, he was not an attorney.

Mr. NAUS.—Correct. May I add, your Honor,

the inquiry now before the Court is an inquiry as to whether a certain objection to a right of privilege is a proper objection. I am merely examining with respect to that. When we finish the temporary examination we will go back to that objection and I then wish to argue first, that Mr. Pike did not act as an attorney in this matter within the meaning of the law, and, secondly, even though he did, we will show that the privilege does not exist in this case, as I will point out from the authorities.

A. Your Honor, I would like to ask a question for information, if I may, as to the statement the Court made, as to what the deductions were from the procedure of the District Attorney. I came here under subpoena of the District Attorney to testify in this case, and give him such information as I am called upon to give, which I am perfectly willing to give, if it is not privileged.

The COURT.—Never mind involving yourself. The situation here is there are certain exceptions to the rule, and you are not interested, so far as the ruling of the Court is concerned, if questions are allowed by the Court. Of course, we want a candid expression from you as a witness as to whether you were working in the capacity of an attorney, as far as you know.

The WITNESS.—In my opinion, I was.

Mr. NAUS.—Let us get back to the question.

Q. You recall, do you not, that, as you stated, your business with [234] these gentlemen was by correspondence, and you recall further, do you

not, receiving from Mr. Robinson that letter marked Exhibit 33 for Identification? A. Yes.

Mr. HARRIS.—If your Honor please, I renew the objection, and would like a ruling of the Court on it. Counsel is asking a new question now, and I want to preserve the record. If it is a privileged communication, he is not entitled to an answer.

The COURT.—The objection will be overruled.

Mr. HARRIS.—Exception.

Mr. McDONALD.—Exception.

Mr. NAUS.—Q. You recall further, do you not, that it was upon that letter that you thus received, Exhibit 33 for Identification, that you proceeded to incorporate the corporation in question?

Mr. HARRIS.—Objected to as leading and suggestive, and calling for the conclusion of the witness, and asking for a privileged communication.

Mr. NAUS.—I have not asked for the contents of any communication so far.

Mr. HARRIS.—Your Honor has instructed us several times not to argue these points, and we do not desire to interrupt an answer. Mr. Naus has not been here throughout the case, and I do not desire to add on to the record or interrupt the testimony, but it puts us to a good deal of disadvantage when Mr. Naus constantly makes this kind of remarks, and we do not answer them.

The COURT.—If Mr. Naus makes a statement that is not properly in the record, or in evidence, although it should not have been made, it is not to be considered as evidence, of course; no statement

of counsel is to be received by the jury as evidence. I will allow the question.

Mr. HARRIS.—Exception.

A. Undoubtedly no. [235]

Mr. NAUS.—Q. Now, Mr. Pike, it is a fact, is it not, that when you were called upon to incorporate this corporation in question, you were not asked to give a single piece of advice to any one of the defendants?

Mr. HARRIS.—Objected to as leading and suggestive, immaterial, irrelevant, and incompetent, tending to elicit a privileged communication.

Mr. NAUS.—I am trying to find out if he was employed to give any advice, or whether he was merely employed to do a ministerial or clerical act.

Mr. HARRIS.—It does not make any difference.

The COURT.—I will overrule the objection.

Mr. HARRIS.—Exception.

A. Well, up to the time of receiving this communication, I had undoubtedly never met any of the gentlemen except Mr. Robinson, and I think perhaps before that time I had met him through an attorney in San Francisco for whom I had incorporated a company.

Mr. NAUS.—I ask that the answer go out as not responsive.

A. I have not finished, yet. According to my recollection now, the articles of incorporation were sent to me, and I was requested to see whether or not they were in conformity with the laws of Nevada; and if they were to see that they were filed and copies of same were sent to them after the

company was organized, and that undoubtedly was done, but the letter is not in evidence.

Q. Now, Mr. Pike, I hand you another document, marked Exhibit 34 for Identification, and ask you whether you recall receiving that from Mr. Robinson as a part of the instructions to you in this corporation work by you?

Mr. McDONALD.—To which we object as immaterial, irrelevant, and incompetent, a privileged communication between attorney and client. [236]

Mr. NAUS.—I am merely asking if he received it.

Mr. HARRIS.—We join in the objection in behalf of the defendant Randolph.

The COURT.—I will overrule the objection, at this time.

Mr. HARRIS.—Exception.

Mr. McDONALD.—Exception.

A. Yes, I received this letter at the organization of the company.

Mr. HARRIS.—Now, if your Honor please, the witness has testified he received it, and we ask that he not refresh his recollection from it, but that we have his testimony without refreshing his recollection from it. It is not a memorandum made in his handwriting.

Mr. NAUS.—Q. Now, Mr. Pike, I hand you Exhibit 33 for Identification, and ask you whether you received that from Mr. Robinson in the course of his instructions to you about this incorporation work.

Mr. McDONALD.—To which we object as imma-

terial, irrelevant, and incompetent, and a privileged communication between attorney and client.

Mr. HARRIS.—We join in the objection.

The COURT.—This particular letter "YY" was received after the incorporation? A. Yes.

Q. Was that true of that other one?

A. That must have been.

Q. In other words, at that time you were acting as the agent, were you?

A. Your Honor, I do not believe I ever acted as agent for this Company, but the records from the Secretary of State's office, or the Clerk's office would show whether I was, or not, but acting as resident agent would not have anything to do, necessarily, with the transfer of stock certificates, unless you were acting as registrar or as assistant secretary.

Mr. NAUS.—Q. Getting back to the question, did you or not receive that as a part of the incorporation work done by you for Mr. [237] Robinson?

A. Yes.

Q. Now, Mr. Pike, I hand you another document, marked Exhibit 36 for Identification, and ask you whether you likewise received that from Mr. Robinson as part of your instructions in this incorporation work?

Mr. McDONALD.—To which we object as immaterial, irrelevant and incompetent, a privileged communication, between attorney and client.

Mr. HARRIS.—We join in the objection.

The COURT.—The objection will be overruled.

Mr. HARRIS.—Exception.

Mr. McDONALD.—Exception.

A. Yes, I received this letter.

The COURT.—In regard to the issuing of certificates in connection with the corporation, you would do that as agent?

A. Frequently, in order to have stock certificates issued in the State of Nevada, they ask some person in the office to be named as a registrar, or as assistant secretary, or something of that sort, and then on their instructions the stock is issued. The resident agent merely acts for the purpose of receiving process, service upon him in legal procedure.

Q. But I mean to say that in acting for the purpose of transfer of stock, or issuing of a particular kind of a certificate, in doing that particular act you would not characterize it as part of your law work?

A. No.

Q. You feel that in that work you would be acting in the capacity of agent?

A. Yes. That was done merely as an accommodation.

Mr. NAUS.—Q. As a matter of fact, it was your stenographer at Reno who acted as secretary or transfer agent for this corporation, was it not?

A. That is true, and they wrote to me apparently instead of to her, and I gave the letter to her and she did as they [238] requested.

Q. Then you would write back and tell them it was done?

A. After the incorporation of the company, yes.

Q. Now, Mr. Pike, I hand you a batch of papers, and ask you whether you recognize those as your own personal file that was sent to San Francisco a

couple of months ago—your own personal file of letters that you wrote to Mr. Robinson in reply to the letters I have handed up to the Court.

Mr. McDONALD.—To which we object on the ground it is immaterial, irrelevant, and incompetent, a privileged communication between attorney and client.

The COURT.—Q. During that time did you act in the capacity of agent as distinguished from an attorney at law?

A. As a matter of fact, I do not believe I ever was the agent for this corporation.

Q. But didn't you do acts which were the acts of an agent? A. Yes.

Q. For instance, the work in this last letter appertains to work which was not, in itself, the work of an attorney at law?

A. Yes, I think that is correct.

Q. So that although you may not have been resident agent, you did act as distinguished from an attorney at law?

A. In those capacities I did.

Mr. HARRIS.—I join in the objection made by counsel.

Mr. HARRIS.—As far as the defendant Randolph is concerned, I join in the objection, and I adopt the objection of hearsay, there is no connection shown.

The COURT.—The objection will be overruled.

Mr. HARRIS.—Exception.

Mr. McDONALD.—Exception.

The COURT.—As I understand it, from what you

hold there, [239] that work is characterized as the work of an agent as distinguished from an attorney at law?

A. I think most of those letters refer to that.

Q. If there are any that do not, specify any regarding work that you were doing in the capacity of an attorney at law; segregate them.

Mr. HARRIS.—One moment. I object to that as calling for a conclusion on the part of the witness. That is for the Court to determine, as to whether they are in the capacity of an attorney at law, or as an agent.

Mr. NAUS.—I think Mr. Harris states the correct rule, it is for your Honor and not the witness.

The COURT.—I was going to do that. You separate them and hand them to me.

A. Well, I think that is for your Honor to determine.

Mr. NAUS.—Hand them up to the Court.

Q. Were these letters sent by you to Mr. Robinson as a part of the correspondence in which you received these other letters from him? A. Yes.

Q. That batch you hold in your hand and the batch on his Honor's bench comprise the transaction between you and any of these defendants?

A. Absolutely.

Q. And your entire dealings were by correspondence as far as this corporatiton work was concerned?

A. Except when they first organized the company they appeared there and held a meeting there.

Q. Just the routine steps of making out the paper, steps that were taken? A. Yes.

Mr. NAUS.—Q. Do these yellow sheets that you just held in your hand, together with the white sheets on his Honor's bench, do those, together, comprise the transaction between you, on one side, and the defendant on the other, with reference to this corporation [240] work?

Mr. HARRIS.—We object on the ground it is an incorrect statement of the testimony, the witness having already stated they were there in person, and transacted business, and adopt the rest of the objection.

Mr. McDONALD.—The same objection on behalf of the defendant Kassmir.

The COURT.—Were they there in person?

A. Well, on one occasion, when they organized the company, Mr. Robinson and Mr. Kassmir, and I think Mr. Cromwell Simon was there, but I am not sure about that. I think they came up there one day and held a meeting, but outside of that, if they were all there, these letters represent the entire transaction between us.

Mr. NAUS.—If your Honor please, unless counsel wish to examine him further on the question, I am prepared to argue the question of the admissibility of the evidence.

The COURT.—The objection is overruled.

Mr. HARRIS.—Exception.

Mr. McDONALD.—Just one question:

Q. You met Mr. Kassmir, did you not, before you met Mr. Robinson?

A. I don't remember whether I did or not. I know Mr. Robinson was sent to me one time by an attorney named Frank Golden, for whom I organized a couple of companies.

A. Anyhow, Mr. Golden had some companies incorporated, and then he sent Mr. Robinson to me, and whether I met Mr. Robinson before I met Mr. Kassmir I don't know. As a matter of fact, I almost had forgotten having met Mr. Kassmir until I saw him in the courtroom.

Q. You would not say positively that you had not met Mr. Kassmir and Mr. Cromwell Simon before you met Mr. Robinson, and were retained by them to advise them as to the proposition of incorporating under the laws of Nevada?

A. Undoubtedly I did advise them about [241] incorporating under the laws of Nevada. Whether I met him before Mr. Robinson, or at the same time, I could not be able to tell you.

Q. You advised them as to the very liberal features of the Nevada laws?

A. What I believed to be liberal features, yes.

Q. You discussed with them that advice?

A. I don't know whether you want me to go ahead with the answer on this matter.

Mr. NAUS.—I am not objecting. Go ahead and answer any question that is asked you.

A. I think I did, perhaps.

Mr. McDONALD.—Q. And in all of this transaction, Mr. Pike, you acted as an attorney at law?

A. Well, up to a certain point I would say I did.

Q. You never were resident agent of this corporation?

A. No, I thought that I had been, but it developed that I was not resident agent, and in receiving letters from Mr. Robinson concerning the transfer of stock I suppose he wrote to me because he probably told me that I was acting as resident agent, or because my stenographer at that time was acting as registrar or assistant secretary of the corporation.

Q. You know, as a matter of fact, that Mr. McCaffrey was the resident agent of this corporation?

A. I think he was, now.

Q. These letters were sent to you in your capacity as attorney at law to advise with Mr. McCaffrey?

A. Well, I never advised with Mr. McCaffrey, at all, that I remember of. Once in a while he would come around and have me identify him to cash a check, or something, but when I would receive these letters from Mr. Robinson I would hand them to my stenographer, and she would carry out their instructions and perhaps hand whatever papers were necessary to be delivered to him to me to see whether or not they were correct as far as the form of procedure was concerned, and they would be mailed to him.

Mr. McDONALD.—At this time, on behalf of the defendant [242] Kassmir, we will renew our objection, and ask that all of the testimony of this witness be stricken out on the ground that it is a privileged communication between attorney and client.

Mr. HARRIS.—We join in the objection made by Mr. McDonald.

The COURT.—At this time the objection will be overruled.

Mr. HARRIS.—It was really a motion to strike. It is denied?

The COURT.—Denied.

Mr. HARRIS.—I wish to note an exception on behalf of the defendant Randolph.

Mr. NAUS.—Q. Now, Mr. Pike, one of your answers to Mr. McDonald was, as I recall it, "I think, perhaps." You recall that answer, when he was asking you as to whether you had given any advice outside of what these letters called for?

A. Well, I notice in that—

Q. (Interrupting.) Do you remember that answer? A. Yes.

Q. Did you answer that way because you had no independent recollection right now of having ever given any advice other than what you gave in writing these letters?

A. I do think, Mr. District Attorney, that on one occasion, when the company was formed, that these gentlemen were there, and that I perhaps advised them as to the procedure under the Nevada laws.

Q. You say perhaps you advised them. Can you say that you did?

A. I could not say positively, but I notice in the first communication to me that they asked me to look over the articles and—

Mr. NAUS.—Q. Have you finished your answer?

A. No, I had not. They asked me to look over

the articles and advise them as to whether or not they were in correct form under the Nevada law.

Q. I am asking you at this time not to reason from anything you see in writing, here, but to search your recollection and say whether from your recollection you can say there was ever a single time that [243] you had any oral interview with any of these defendants and advised any of them.

A. I may be mistaken, but I believe that I did, that the first meeting was held after the articles of incorporation had been filed, that these gentlemen came to Reno and came to my office, and that there a meeting was held, and that on that occasion I advised them as to the form of different resolutions that should be passed, and matters of that kind.

Q. But you have no distinct recollection of that, have you, beyond assuming that that probably happened?

A. Well, I am quite sure that it did.

Mr. NAUS.—That is all.

Mr. McDONALD.—At this time we renew our motion.

Mr. NAUS.—We are prepared to argue this whole matter now, if your Honor please.

Mr. McDONALD.—We renew our motion to strike all of the testimony of this witness from the record upon the ground that the testimony shows that this witness was acting in the capacity of an attorney at law in the State of Nevada, that all of his communications with these defendants, or any of them, were privileged communications, and ad-

vice that he gave his clients, upon requests for advice.

Mr. HARRIS.—We join in the motion on behalf of the defendant Randolph.

(Thereupon the jury retired and counsel proceeded to argue the question, at the conclusion of which the jury returned to the courtroom.

The COURT.—The jury being present, and the defendants being present, I will ask the reporter to read the motions of counsel.

(The record was read by the reporter.)

The motions will be denied.

Mr. HARRIS.—Exception on behalf of the defendant Randolph.

Mr. McDONALD.—Exception on behalf of the defendant Kassmir. [244]

Mr. SWEENEY.—At this time I would like to offer in evidence Government's Exhibit No. 33 for identification.

Mr. McDONALD.—To which we object on the grounds heretofore stated.

Mr. HARRIS.—We object on the ground it is a privileged communication, and not permitted to be divulged by the law.

Mr. McMILLAN.—As far as the defendant Robinson is concerned, it is objected to on the ground the proper foundation has not been laid.

The COURT.—The objection is overruled.

Mr. HARRIS.—Exception on behalf of the defendant Randolph.

Mr. McMILLAN.—Exception on behalf of the defendant Robinson.

Mr. McDONALD.—Exception on behalf of the defendant Kassmir.

Mr. SWEENEY.—Q. How did you get this letter?

A. I got it through the mail, I imagine.

The COURT.—Q. You imagine. Do you know that?

A. I am quite sure it must have come through the mail, yes.

Mr. SWEENEY.—Q. Do you recall receiving it through the mail?

A. I know it was in our file, and I was requested by the United States District Attorney to bring it down here.

Mr. McMILLAN.—We renew our objection to the introduction of the document in evidence, on the ground it has not been identified as having been received by the witness through the United States mails.

Mr. HARRIS.—The same objection.

The COURT.—I will permit it to be received.

Mr. HARRIS.—Exception.

Mr. McMILLAN.—Exception.

Mr. SWEENEY.—It is dated July 25, 1925, Samuel H. Robinson, Attorney at law, Hobart Building, San Francisco, Cal.

(The document was marked U. S. Exhibit 27.) [245]

(Which original exhibit is before this Honorable Court by stipulation and order and is a letter set forth in the indictment as Exhibit "WW," dated July 25, 1925.

EXCEPTION No. 42.

Q. Can you identify that, Mr. Pike? A. Yes.

Q. What is that?

A. This is a letter I wrote to Mr. Robinson when I received that letter.

Q. When you received this letter through the mail?

A. Yes, when I received it—I think I received it through the mail.

Mr. SWEENEY.—If your Honor please, I offer in evidence the letter of July 28, 1925, addressed to Mr. Samuel H. Robinson.

Mr. HARRIS.—To shorten the record, may it be deemed that we make the same objection, and may it be so stipulated, to each and every one of these letters between Mr. Pike and Mr. Robinson, on the same grounds heretofore stated, they are privileged communications, and, therefore, are not admissible?

The COURT.—On the objection of being privileged communications.

Mr. HARRIS.—Yes, unless counsel have any additional objections.

Mr. McMILLAN.—The objection of Robinson is that these letters are without proper foundation; it has not been shown that they were deposited in the mail in this jurisdiction, that is, in the Southern Division of the United States District Court for the Northern District of California, nor has it been shown that they were received by the witness through the mail, or sufficiently shown that they

were mailed, or that they had been received in this jurisdiction through the United States mail.

Mr. HARRIS.—We adopt that objection on behalf of the defendant Randolph.

The COURT.—Q. Did you mail the original letters?

A. I never mailed them, I dictated the letters, and this has got my dictation marks on it. [246]

Q. You don't know, personally, whether it was mailed, or not?

A. Personally, I do not; that is, I could not say it was put in the postoffice, but that is my belief, that it was.

Q. In other words, all you did was to dictate it, sign it, and give it to whom?

A. To my stenographer. Perhaps I did not even sign it.

Q. And you gave her instructions to mail it?

A. Yes. That is as far as I can go.

Mr. SWEENEY.—It is in the ordinary course of business.

Mr. SWEENEY.—As a matter of fact, this letter is not an indictment letter.

The COURT.—I presume you are offering it because it is a letter that you believe was received by the defendants, or some of them, in connection with the scheme?

Mr. SWEENEY.—It is a part of the general scheme.

The COURT.—But you do not show that it was ever received. How does this bear on it if it is not shown it was put in the mail?

Mr. SWEENEY.—Because Mr. Pike testified that was the usual way of mailing letters.

Mr. McGEE.—That is no proof that this letter was ever mailed in the United States postoffice box.

The COURT.—I will sustain the objection to this letter.

Mr. SWEENEY.—The question, your Honor, is was the letter received? We are not interested in this particular letter as a mail letter. It is not a letter set out in the indictment.

The COURT.—How are you going to connect it up with the fact that it was received.

Mr. SWEENEY.—Q. Can you identify this?

A. Yes, that is one of the letters.

Mr. McGEE.—Are we still on the last letter, or are we proceeding on some other letter? [247]

The COURT.—For your information, so we won't have to have the record read, the copy of the letter which was offered has not yet been received. Mr. Sweeney is endeavoring now, as I understand it, to lay a proper foundation for its reception in evidence.

Mr. SWEENEY.—Q. Are you familiar with that letter?

A. Yes.

Q. Did you receive this through the mail?

A. I received it in my office, and I want to state—

The COURT.—Q. Do you open up your own mail?

A. Most all of my mail I open. Frequently it is opened by my secretary and I read it.

Q. When you receive your mail after it has been

opened by someone else, do they bring you the envelope as well as the letter?

A. Yes, as a rule, it is all laid on my desk.

Q. You say as a rule. Have you any recollection?

A. I am convinced in my own mind that I received it through the United States mail, in the ordinary way, the same as all letters.

Q. Is that your recollection?

A. That is my recollection.

Mr. SWEENEY.—At this time we make an offer of Government's Exhibit No. 35 for Identification.

Mr. McDONALD. — We object on the ground heretofore stated, and on the further ground the witness does not know whether this was received through the United States mail.

Mr. McMILLAN.—The defendant Robinson objects on the ground that the proper foundation has not been laid, in that it has not been shown that this letter was mailed in this jurisdiction, or the other letter received was mailed, or received in this jurisdiction.

The COURT.—I might call counsel's attention to the fact that whether it went through the mail, or not, it might be relevant; it might have been a letter which was written and signed, and have some bearing upon the issue, show some connection with it, and at the same time it might have been delivered by hand. You may make your [248] objection as to the mailing, or you can make it a complete objection.

Mr. McMILLAN.—I adopt your Honor's suggestion.

Mr. McGEE.—The defendant Goodwin does, also, with the further objection that it is one of the letters upon which one of the counts of this indictment is based, and according to the allegation of the indictment it was mailed in the United States mails, and, therefore, that becomes a material part of the admissibility of this letter in evidence, to sustain that letter being received in evidence.

Mr. HARRIS.—I adopt all of the objections made on behalf of the other defendants.

The COURT.—Overruled.

Mr. McMILLAN.—Exception.

Mr. HARRIS.—Exception.

(The document was marked U. S. Exhibit 28.)

(Which original exhibit is before this Honorable Court by stipulation and order and is the letter set forth in the Indictment as Exhibit "AAA").

EXCEPTION No. 43.

Mr. SWEENEY.—Q. You have already identified that, I believe, Mr. Pike.

A. Yes.

Mr. SWEENEY.—At this time I will offer in evidence Government's Exhibit No. 34 for Identification.

Mr. McDONALD.—To which we object on the ground it is immaterial, irrelevant, and incompetent, a privileged communication, upon the further ground that the proper foundation has not been laid.

The COURT.—On this letter no testimony has been offered, at all, practically none. I suppose as to this letter the procedure was the same as before, that is, you received it, and believe it [249] came through the United States mails, but you don't know positively how it got on your desk.

A. That is correct.

Q. You found it in your files? A. Yes.

Q. You recall receiving the letter, but you don't know how you got it, except you got it on your desk? A. Except my own belief, that is all.

Mr. McMILLAN. — The defendant Robinson makes the same objection that has heretofore been urged to the other exhibits, upon the ground that the proper foundation has not been laid.

The COURT.—The objection will be overruled.

Mr. McMILLAN.—Exception on behalf of the defendant Robinson.

Mr. HARRIS.—Exception on behalf of the defendant Randolph.

(The document was marked U. S. Exhibit 29.)

(Which original exhibit is before this Honorable Court by stipulation and order and is the letter set forth in the Indictment as Exhibit "YY.")

Referring to the letter of Samuel H. Robinson of August 26, 1925, and in answer to your question whether I mailed those certificates, I gave that letter to the stenographer and instructed her to fill them out as requested, and to mail them to him. I have no direct knowledge whether they were mailed or not; she can undoubtedly testify whether they were or not. [250]

The method of handling correspondence in my office was, I would dictate a letter to my stenographer, and sometimes if it was in the course of routine business, I might not even sign it, and she would put a stamp on it and put it in the post-office. This would be in the ordinary course of my business.

EXCEPTION No. 44.

Mr. SWEENEY.—Q. I will show you this letter and ask you if you can identify that.

A. Yes, that was written to me by Mr. Robinson.

Q. On the subject matter? A. Yes.

Mr. SWEENEY.—At this time I offer in evidence Government's Exhibit No. 36 for Identification.

The COURT.—Let me see what that is.

Mr. SWEENEY. — The signature has already been identified.

Mr. McDONALD.—Objected to on the ground it is immaterial, irrelevant, and incompetent, and a privileged communication.

Mr. McMILLAN.—Objected to on the grounds heretofore stated with reference to the other letters, and, furthermore, that the venue has not been sufficiently established.

Mr. HARRIS.—I adopt all the objections on behalf of the defendant Randolph.

The COURT.—The objection will be overruled and it will be admitted in evidence.

Exceptions were taken on behalf of defendants Kassmir, Randolph and Robinson.

(The document was marked U. S. Exhibit 30.)

(Which original exhibit is before this Honorable Court by stipulation and order and is the letter set forth in the Indictment as Exhibit "BBB.")

EXCEPTION No. 45.

Referring to the letter of July 25 received from Robinson, I did receive an original and two copies of the articles of [251] incorporation of the Cromwell Company, and filed a copy of them at the Secretary of State's office in Carson City, and filed a copy in the County Clerk's office in the City of Reno, and kept the other copy in the office, I imagine, as the law requires. The exemplified copy that you are now offering in evidence is a true copy of the articles that I left with the Secretary of State on July 30, 1925.

The foregoing testimony was objected to by counsel for Randolph on the grounds that it is immaterial, irrelevant, and incompetent, and privileged communications between attorney and client; objections overruled, and exception noted.

(The document was marked U. S. Exhibit 31, which original exhibit is before this Honorable Court on stipulation and order.)

The corporation had an initial meeting in the office. There were present Mr. Glynn, Mr. Cahlan, Miss Zannon, myself, Mr. Kassmir, Mr. Robinson, and Mr. Cromwell Simon. I do not remember Cromwell Simon very much; I am quite sure he was there. Miss Zannon wrote up the minutes of the first meeting. There were two meetings, the incor-

poration meeting and the meeting of the first Board of Directors.

EXCEPTION No. 46.

Mr. SWEENEY.—Q. Mr. Pike, I will ask you if you can identify this.

A. Yes, they are certificates or blank stock certificates of Cromwell Company, Inc., both common and preferred; also there are a few certificates which have been partially made out, that is, they are signed, but do not bear the seal of the corporation.

Mr. SWEENEY.—At this time I offer in evidence what purports to be or what are the stock certificates of Cromwell & Co., Inc., both common and preferred.

Mr. HARRIS.—To which we desire to enter an objection on [252] behalf of Randolph that no foundation has been laid, it not being shown that he had any control, knowledge, or direction thereof.

Mr. McMILLAN.—Objected to on behalf of Robinson that the proper foundation has not been laid.

The COURT.—How do these bear upon the issue?

Mr. SWEENEY.—This is being identified as a certificate of stock which Mrs. Beans got in lieu of money that she paid to Cromwell & Co., in the bank which was started. I am going to trace the certificate back to its place of origin in these books, back to Robinson, back to Kassmir. In other words, it is a part of the scheme to take the money and property from one of these victims, or some

of these victims, not only that, but I am going to prove that each one of these certificates was issued to various victims who had given their money and property to Cromwell Simon & Co.

The COURT.—The objection is overruled, and it will be received.

Exception taken by Randolph and Robinson.

Cross-examination.

(By Mr. McMILLAN.)

The mail coming into my office is frequently opened by my stenographer. Usually my stenographer will open the mail, segregate it, and lay it on my desk. Envelopes are thrown into the waste-basket; we seldom keep them unless there is some purpose in keeping them. Don't believe that we kept any of the envelopes in this matter. I have found none.

EXCEPTION No. 47.

Mr. McMILLAN.—May it please your Honor, we move to strike out all of the testimony of this witness on behalf of the defendant Robinson, all of the testimony wherein the letters have been introduced in evidence under the testimony of this witness, upon the grounds that the proper foundation has not been laid, and that the [253] venue has not been sufficiently shown in any instance to entitle any of such letters to admission in evidence.

The COURT.—I am going to rule upon the matter, but will just give you my idea. Imagine a letter was not actually shown by circumstances that justified a person in believing that any particular

matter came through the mail, and that the letter has been identified as a communication, a signed communication of one of the parties charged here; imagine also that there is certain information in it that bears upon the issues here. It may be admissible, although it may not measure up to the point that you are basing your objection on, as to whether it went through the mail. I think you will find such matter in going through the record. I am trying to give counsel an idea of the method of ruling, even though it should not be shown that it was sent through the mail; it might be admissible anyway. I will overrule the objection.

Exception was here noted by counsel for Robinson, and counsel for Randolph joined in the aforesaid objections and moved to strike out testimony of witness, which motion was denied and noted his exception to the Court's ruling overruling his objections.

To which ruling the defendants then and there duly and regularly excepted.

EXCEPTION No. 42.

That the Court erred in admitting in evidence certain testimony of Tess Belford, secretary and stenographer of Mr. Pike, the attorney, and exhibits in connection therewith which said testimony and the rulings assigned as error in connection therewith more fully appear as follows:

The witness testified that during the year 1925, she was secretary and stenographer to Mr. Leroy F. Pike, City Attorney of Reno, Nevada. That her name at that time was Miss Zannon. [254]

Q. What was the custom in Mr. Pike's office with reference to mail, Mrs. Belford?

Mr. HARRIS.—At this time may we have the objection as to the privileged character of the communication extending to the secretary or clerk of any attorney at law, and I therefore object as immaterial, irrelevant, and incompetent, and an attempt to elicit a privileged communication prohibited by law.

The COURT.—Overruled.

Mr. HARRIS.—Exception.

(It is understood under order of Court that counsel for Randolph has the foregoing objection to all of the testimony of this witness on the ground that it is a privileged communication.)

Usually I got the mail before I would come to the office in the morning, opened and laid it on his desk, and I usually mailed it. As to letters that Mr. Pike was sending out, the custom was for me to mail them, in the U. S. postoffice. All the letters you show me, except that of September 22, 1925, I identify; they are copies of letters I wrote, and I can say that I mailed all the originals of those letters.

(These four copies of letters from Pike to Robinson dated July 28, Aug. 3, Aug. 13, and Sept. 1, 1925, are here offered in evidence under the foregoing objections, admitted in evidence, exception taken, and marked U. S. Exhibit 34, which exhibits are before this Honorable Court by stipulation and order.)

On this letter of July 28, 1925, the "LEP" stands

for Leroy F. Pike, and "Z" for myself. I was Secretary in the Cromwell & Co., Inc., and present at the first meeting of the Board of Directors. What you show me is a true copy of the original minutes of the meeting which I mailed to Mr. Robinson. I prepared the originals, which are dated August 1, 1925. The [255] originals were actually executed by the directors, and I actually saw the signatures put on, by the dummy directors. These minutes to the extent that they appear were adopted.

(The document was admitted in evidence and marked U. S. Exhibit 35, which is before this Honorable Court by stipulation and order.)

What you now show me and which I identify is certificate of preferred stock of Cromwell & Co., which is signed by me and issued by the Company through me as Secretary.

(The document was admitted and marked U. S. Exhibit 36, the original of which is before this Honorable Court by stipulation and order.)

Referring to this stock-book, which is Government's Exhibit 33, I issued every one of those stock certificates. The information with reference to the particular transfers shown usually came from San Francisco, from Mr. Robinson, I think. This letter, Government's Exhibit 29, came through the mail.

Mr. SWEENEY.—Q. Take the book of common stock, Mrs. Belford, are those notations in your writing?

A. Yes, they are.

Q. I will ask you if you can identify that.

A. Yes, I can.

Q. Your signature appears on the bottom of it?

A. It does.

Q. Was the stock issued?

A. By me, for the company.

Mr. SWEENEY.—At this time I want to offer in evidence Certificate 51 of the common stock.

Mr. HARRIS.—In addition to the objection as to privilege, I object on the ground that no authorization or direction or adoption of it by Randolph is shown, immaterial, irrelevant, and incompetent.

Mr. McMILLAN.—The defendant Robinson adopts the objection made by counsel for Randolph. [256]

The COURT.—The objection is overruled.

Mr. HARRIS.—Exception.

Mr. McMILLAN.—Exception.

(The document was marked U. S. Exhibit 39.)

(Witness here identifies three certificates as issued by the company, with her signature thereon, and same are marked U. S. Exhibits 44, 45, and 46 for Identification.)

These represent all the transfers of stock that took place while I was secretary. I remember in the minutes that were read Mr. Kassmir paid for or subscribed for $50,000 worth of stock. Don't know whether that money was ever paid. Do not recall any other minutes ever written up while I was secretary. Mr. Simon was the treasurer, at time company was formed. I had charge of the stock-books, the minute-book, and I think there was

a ledger of some sort—the stubs in the stock certificate book. Mr. Pike was the resident agent. Don't remember having seen those ten certificates signed up in blank. I dated the certificates.

To which ruling the defendants then and there duly and regularly excepted.

EXCEPTION No. 43.

The Court erred in admitting in evidence United States Exhibits 41, 42 and 43, over the objections of the defendants as will more fully appear as follows:

Mr. SWEENEY.—Q. I will show you Government's Exhibit No. 10 for Identification, and ask you if you recognize that.

A. Yes.

Q. Do you know how you got it?

A. Through the mail.

Q. Where did you receive it?

A. At 1828 Anza Street, in June or July, 1925.

Mr. SWEENEY.—I offer it in evidence.

Mr. McMILLAN.—Robinson objects on the grounds that the [257] proper foundation has not been laid, no showing that he authorized or knew anything about the sending of the letter.

The COURT.—The objection is overruled.

Mr. McMILLAN.—Exception.

(The document was marked U. S. Exhibit 41, which original exhibit is before this Honorable Court by stipulation and order, and said letter appears in the indictment as Exhibit "N.")

Witness identifies two checks given by her, the

latter of which she said she gave to Randolph personally, and these checks are introduced in evidence and marked respectively U. S. Exhibits 42 and 43, the originals of which are before this Court by stipulation and order.

To which ruling the defendant then and there duly and regularly excepted.

EXCEPTION No. 44.

That the Court erred in receiving in evidence United States Exhibit 44 over the objections of these defendants as more fully appears as follows:

Mr. SWEENEY.—Q. I will show you Government's Exhibit No. 11 for Identification, and ask you if you can identify that.

A. That is all right.

Q. How did you get that?

A. Through the mail, at 1828 Anza Street, after I paid the money and about a couple of days after the date of the letter.

Mr. SWEENEY.—I offer this in evidence.

Mr. McMILLAN.—Objected to on the grounds that no proper foundation has been laid, nor has it been shown that Robinson authorized or directed or knew anything about the sending of the letter.

The COURT.—Objection overruled.

Mr. McMILLAN.—Exception. [258]

(The document was marked U. S. Exhibit 44, the original of which is before this Honorable Court by stipulation and order, and is the letter referred to in the indictment as Exhibit "O.")

To which ruling the defendants then and there duly and regularly excepted.

EXCEPTION No. 45.

That the Court erred in receiving in evidence United States Exhibits 46 and 47 over the objections of defendants as more fully appears as follows:

Mr. SWEENEY.—Q. I will ask you if you are familiar with that letter?

A. Yes. Received it by mail, at 1828 Anza Street, soon after I sent the check, a day or so afterward.

Mr. SWEENEY.—The signature on there has already been proved. I offer this in evidence.

Mr. McMILLAN.—Proper foundation has not been laid, and it has not been shown that Robinson authorized or had anything to do with the sending of the letter.

The COURT.—Q. Objection overruled.

Mr. McMILLAN.—Exception.

(The document was marked U. S. Exhibit 46, which original exhibit is before this Court by stipulation and order, and is the letter set forth in the indictment as Exhibit "P.")

Signed something on those occasions, I think, but never got copy of whatever I signed. What you show me now I got by mail at 1828 Anza Street. (Certificate of Simon & Co., Sept. 5, 1925.)

(Document was marked U. S. Exhibit 47, and is before this Court on stipulation and order.)

To which ruling the defendants then and there duly and regularly excepted. [259]

EXCEPTION No. 46.

That the Court erred in admitting in evidence

certain testimony over the objections of defendants as will more fully appear as follows: Ernest Hipp, a witness on behalf of the United States, who resided at Santa Clara, and who had a conversation with defendant Goodwin in March, 1925, the following question was asked, objection made and ruling had:

Q. Just state what that conversation was at that time and at that place.

Mr. McMILLAN.—Objected to on behalf of the defendant Robinson as too remote, and as *res inter alios acta.*

Mr. HARRIS.—The same objection.

The COURT.—The objection is overruled.

Mr. HARRIS.—Exception.

Mr. McMILLAN.—Exception.

Q. At that time, the first thing that took place in this conversation was he inquired of me as to what stock I had. I had previous to that time communicated with the firm of Cromwell Simon & Co., and they had come down to my office in answer to that communication with reference to trading in certain stocks that I had on stocks that they were to buy for me. The first thing they asked was the stocks that I had that I wished to dispose of, that is, to turn in, and I told them, and they stated their position, that is, what they would allow me on my stock, and suggested stocks that I was to buy, which, in their opinion, were good stocks. I finally agreed to buy, purchase, these stocks, that is, on turning in my stock on the purchase of these stocks that they suggested, and they were to be bought on the

partial payment plan. My stocks were to be held as collateral and to be held as first payment on these stocks, and after they had stated their proposition I then told them I would consider the matter and [260] let them know in a few days; but they suggested, in fact urged me, to close the deal at that time, because the market was liable to rise, and the stock be high, and things of that kind, so after a little more conversation I finally closed the deal with them.

To which ruling the defendants then and there duly and regularly excepted.

EXCEPTION No. 47.

That the Court erred in admitting in evidence certain testimony over the objections of the defendants as will more fully appear as follows:

Q. At that time did you part with any collateral, deliver to them any collateral in pursuance of this agreement?

Mr. McMILLAN.—The defendant Robinson now objects to it as hearsay, the proper foundation not laid, and too remote.

The COURT.—The objections will be overruled.

Mr. McMILLAN.—Exception.

A. I did.

Mr. O'BRIEN.—What was the character of the collateral that you delivered to them, what kind of collateral was it?

Mr. McMILLAN.—The same objection.

The COURT.—The same ruling.

Mr. McMILLAN.—Exception.

A. It consisted of stock in the Durant Motor Corporation, the Star Motor Corporation, the Hayes Hunt Body Works.

To which ruling the defendants then and there duly and regularly excepted.

EXCEPTION No. 48.

That the Court erred in admitting in evidence United States Exhibit 50 over the objection of defendants as will more fully appear as follows:

The witness testified that he received through the mail [261] from Cromwell Simon & Company, at his home in Santa Clara, in April, 1925, a letter and enclosures marked as aforesaid, to which objection was made on the ground that it was too remote, hearsay, and proper foundation had not been laid.

To which ruling the defendant then and there duly and regularly excepted.

EXCEPTION No. 49.

The Court erred in admitting in evidence United States Exhibit 51 over the objection of the defendants as will more fully appear as follows:

The witness testified that he had received the exhibit at approximately the same time as the exhibit letters above referred to in the month of April, 1925, to which offer objection was made by defendants on the ground stated in objection to Exhibit 50, and which objection was overruled and said exhibit admitted in evidence.

To which ruling the defendants then and there duly and regularly excepted.

EXCEPTION No. 50.

That the Court erred in admitting in evidence United States Exhibit 52 over the objection of the defendants as will more fully appear as follows:

The witness identified said exhibit and declared that he had received it at his home in Santa Clara from Cromwell Simon through the mail. Upon offer of the exhibit, objection was made by the defendants on the ground stated in the last assignment.

To which ruling the defendants then and there duly and regularly excepted.

EXCEPTION No. 51.

That the Court erred in receiving in evidence United States Exhibit 55 over the objection of the defendants as will more fully appear as follows: [262]

Mr. SWEENEY.—I offer in evidence this receipt for stock delivered by Miss Oliver to Mr. Kassmir and Mr. Simon. I offer it in evidence at this time.

Mr. McMILLAN.—The defendant Robinson objects to it on the ground that it is too remote, hearsay, and the proper foundation has not been laid.

The COURT.—How about the signature?

Mr. SWEENEY.—She testified that she saw Mr. Simon sign it.

The COURT.—You saw him sign it?

A. Yes.

Mr. McGEE.—Objected to on behalf of the de-

fendant Goodwin as immaterial, irrelevant, and incompetent, hearsay.

The COURT.—The objection will be overruled, and it will be received in evidence as U. S. exhibit next in order.

Mr. McGEE.—Exception on behalf of Goodwin.

Mr. McMILLAN.—Exception.

Mr. SWEENEY.—I will read it. (Reading.)

(The document was marked U. S. Exhibit 55.)

To which ruling the defendants then and there duly and regularly excepted.

EXCEPTION No. 52.

The Court erred in admitting in evidence testimony concerning a conversation of Miss Clara Oliver with Mr. Kassmir, over the objection of defendants and which said conversation was that he had come in regard to buying some more stock. That nothing was said the first time about investing in the firm of Cromwell Simon & Company.

To which ruling the defendants then and there duly and regularly excepted.

EXCEPTION No. 53.

That the Court erred in receiving in evidence United States Exhibit No. 56 over the objection of the defendants as will more [263] fully appear as follows:

Mr. SWEENEY.—Q. I will ask you, Miss Oliver, if you can identify that.

A. Yes.

Mr. SWEENEY.—At this time I would like to

offer in evidence what purports to be a receipt dated June 3, 1925, and directed to this lady, here.

Mr. McMILLAN.—Objected to on behalf of the defendant Robinson, on the ground it is too remote, hearsay, and the proper foundation has not been laid.

The COURT.—The objection will be overruled, and it will be received in evidence as U. S. exhibit next in order.

Mr. McMILLAN.—Exception.

To which ruling the defendants then and there duly and regularly excepted.

EXCEPTION No. 54.

That the Court erred in receiving in evidence, United States Exhibit 57 over the objection of the defendants as will more fully appear as follows: The witness testified that she was present when the exhibit was opened by her sister. It was in an envelope, stamped, United States mail, and came in the envelope identified. Objection was made on the ground that it was too remote, hearsay, and that the proper foundation had not been laid and which objection was overruled.

To which ruling the defendants then and there duly and regularly excepted.

EXCEPTION No. 55.

That the Court erred in admitting in evidence United States Exhibit 58 over the objection of the defendants as will more fully appear as follows:

The witness testified that she could identify the

exhibit letter addressed to her sister, and knew of her own knowledge it was received through the mail. At the time of its offer, objection was [264] made on the ground that it was too remote, hearsay, and that the proper foundation had not been laid, which objection was overruled and the letter received in evidence.

To which ruling the defendants then and there duly and regularly excepted.

EXCEPTION No. 56.

The Court erred in receiving in evidence United States Exhibit 59 over the objection of the defendants as will more fully appear as follows:

The witness testified that the notations made on the exhibit were made by Mr. Kassmir at the time the company was talked of in Reno the 6th or 7th of August. Objection was made on the ground that it was hearsay and the proper foundation had not been laid, which objection was overruled and the notations admitted in evidence.

To which ruling the defendants then and there duly and regularly excepted.

EXCEPTION No. 57.

That the Court erred in admitting in evidence United States Exhibit 60 over the objection of the defendants as will more fully appear as follows:

The witness testified that the check marked Exhibit 60 was a check signed by Mr. Kassmir, which had come to her from her checking account and that it had been given to Mr. Kassmir himself.

Objection was made by the defendants that no foundation had been laid and no authorization or direction or adoption made by defendants. The objection was overruled and the check admitted in evidence.

To which ruling the defendants then and there duly and regularly excepted.

EXCEPTION No. 58.

That the Court erred in receiving in evidence United States [265] Exhibit 61 over the objection of defendants as more fully appears as follows:

Mr. SWEENEY.—And I offer this.

The COURT.—Q. Was that signed by Mr. Kassmir, in your presence?

A. Yes.

Q. It was? A. Oh, yes.

The COURT.—It will be received and the objection overruled.

Mr. HARRIS.—I do not think we noted in the record the objection of Mr. Randolph.

The COURT.—I thought someone stated the objection was the same.

Mr. HARRIS.—But they were separate objections. I made the same objections that I made to the check on behalf of the defendant Randolph.

The COURT.—The same ruling.

Mr. HARRIS.—Note an exception.

Mr. McMILLAN.—And the same objection on behalf of the defendant Robinson.

The COURT.—Overruled.

Mr. McMILLAN.—Exception.

(The document was marked U. S. Exhibit 61.)

To which ruling the defendants then and there duly and regularly excepted.

EXCEPTION No. 59.

That the Court erred in admitting in evidence certain testimony of the witness Oliver over the objection of defendants as will more fully appear as follows:

The witness testified, over the objection of defendants which are fully set forth in the bill of exceptions on file herein with this assignment of errors, to conversations with defendant [266] Kassmir about the company and that Mr. Kassmir and Mr. Randolph thought the witness and others should put all the money they could in it.

To which ruling the defendants then and there duly and regularly excepted.

EXCEPTION No. 60.

That the Court erred in admitting in evidence certain testimony over the objections of the defendants as will more fully appear as follows:

Q. Will you tell us the conversation you had with Mr. Kassmir on that occasion?

Mr. McMILLAN.—The defendant Robinson objects on the ground it is hearsay, and the proper foundation has not been laid.

The COURT.—The objection is overruled.

Mr. HARRIS.—I adopt the objection made on behalf of the defendant Robinson.

The COURT.—The objection is overruled.

Mr. McMILLAN.—Exception.

Mr. HARRIS.—Exception.

A. The only thing I remember was I asked him if he thought it was a better investment than one of their partial payment, and he said decidedly, yes, and I transferred some other deal or contract I had with him into that; I can't remember right now what it was, because I destroyed all of this data.

To which ruling the defendants then and there duly and regularly excepted.

EXCEPTION No. 61.

That the Court erred in admitting in evidence United States Exhibit No. 64 over the objection of the defendants as will more fully appear as follows:

The witness identified said exhibit and declared that it was given to her by Mr. Kassmir. Upon the offer thereof in evidence, [267] objection was made on the ground that it was immaterial, irrelevant and incompetent and hearsay, which objection was overruled.

To which ruling the defendants then and there duly and regularly excepted. [268]

EXCEPTION No. 62.

That the Court erred in receiving in evidence U. S. Exhibit No. 65, to the introduction of which exhibit an objection was made upon the same grounds as in the last assignment, to the admission of which exhibit in evidence, the defendants then and there duly excepted.

EXCEPTION No. 63.

That the Court erred in receiving in evidence U. S. Exhibit No. 66, which was a letter received by Miss Oliver through the mails, of the date it bears, to the introduction of which the defendants objected upon the ground that it was incompetent, without foundation, irrelevant and immaterial. To the ruling of the Court admitting the exhibit in evidence, the defendants duly and regularly excepted.

EXCEPTION No. 64.

That the Court erred in admitting in evidence U. S. Exhibit 67, which was a letter addressed to the witness, Miss Oliver, signed by the defendant Randolph, and of the date it bears, to the introduction of which the defendants objected on the ground that it was hearsay and the proper foundation had not been laid. To the ruling admitting said exhibit in evidence, the defendants then and there duly and regularly excepted.

EXCEPTION No. 65.

That the Court erred in admitting in evidence U. S. Exhibit 68, which was a certificate signed by Cromwell Simon & Company, by V. A. Parks, which was received through the mails by the witness Miss Oliver, to the introduction of which the defendants objected upon the ground that it was hearsay and the proper foundation had not been laid. The defendants duly and regularly excepted to the ruling of the Court admitting the exhibit in evidence. [269]

EXCEPTION No. 66.

That the Court erred in admitting in evidence U. S. Exhibit No. 69, which was a certificate for the purchase of stock, signed by Cromwell Simon & Company, by V. A. Parks, which exhibit was objected to upon the grounds set forth in the previous assignment and to the ruling of the Court, the defendants duly and regularly excepted.

EXCEPTION No. 67.

That the Court erred in admitting in evidence U. S. Exhibit No. 70, which was a certificate similar to the one referred to in the previous assignment, to the admission of which exhibit the defendants objected upon the ground that it was incompetent and hearsay and without foundation, which objection was overruled and exception duly and regularly taken.

EXCEPTION No. 68.

That the Court erred in admitting in evidence U. S. Exhibit No. 71, which is a similar certificate of Cromwell Simon & Company, dated August 29, 1925, and which was objected to on the ground that it was hearsay and without the proper foundation, which objection was overruled and to which ruling, exception was duly and regularly taken.

EXCEPTION No. 69.

That the Court erred in receiving in evidence U. S. Exhibit 72, which was a certificate made out to the witness Mrs. Hager, bearing date of the 12th of June, 1925, which was objected to upon the

ground that it was hearsay and the proper foundation had not been laid, which objection was overruled and to which ruling the defendants duly and regularly excepted.

EXCEPTION No. 70.

That the Court erred in admitting in evidence U. S. Exhibits No. 73 and 74, which were certificates of Wesley & [270] Co., made out to the witness, Oliver, and bearing date, October 22, 1925, and November 17, 1925, respectively, which were objected to as hearsay and without proper foundation. The objection was overruled, to which ruling exception was duly and regularly taken.

EXCEPTION No. 71.

That the Court erred in admitting in evidence U. S. Exhibit No. 75, which was a letter received by Miss Oliver, through the mails, bearing the signature of the defendant Kassmir, which letter was objected to upon the ground that it was hearsay, without the proper foundation, and that it was concerning a matter that transpired after any scheme or conspiracy charged, had ended, which more fully appears as follows:

Mr. SWEENEY.—At this time I wish to offer this letter in evidence.

Mr. McMILLAN.—On behalf of the defendant Robinson it is objected to as hearsay, the proper foundation has not been laid, and we ask that that evidence be limited and restricted to the defendant. Kassmir.

Mr. HARRIS.—The defendant Randolph adopts the objection of the defendant Robinson, and, in addition, calls the Court's attention to the blanket objection, that it is after the time any scheme or conspiracy had ended.

The COURT.—What is the date that appears upon that?

Mr. SWEENEY.—February 12, 1926.

The COURT.—You said that you were endeavoring to make proof to March 8, 1927, so the objection will be overruled.

Mr. McMILLAN.—Exception.

Mr. HARRIS.—Exception.

The COURT.—It will be received in evidence as Government's [271] exhibit next in order.

(The document was marked U. S. Exhibit 75.)

To the reception of said exhibit in evidence, the defendants duly and regularly excepted.

EXCEPTION No. 72.

That the Court erred in receiving in evidence U. S. Exhibit No. 76, which was a letter referred to in the indictment as Exhibit "FF," dated March 15, 1926, received by the witness, Miss Oliver, through the mail, and which was objected to on the ground that it was hearsay and no proper foundation, which objection was overruled, and to which ruling the defendants duly and regularly excepted.

EXCEPTION No. 73.

That the Court erred in receiving in evidence U. S. Exhibit 77, a letter received through the mail by Miss Oliver, dated May 5, which exhibit was ob-

jected to as hearsay, without foundation and incompetent, which objection was overruled, and to which ruling the defendants duly and regularly excepted.

EXCEPTION No. 74.

The Court erred in receiving in evidence U. S. Exhibit 68, which was a letter received through the mail about April 28, by Miss Oliver, signed by the defendant Kassmir, which exhibit was objected to as hearsay and without proper foundation; and which objection was overruled, and to which ruling an exception was duly and regularly taken.

EXCEPTION No. 75.

The Court erred in receiving in evidence U. S. Exhibit 79, which was a letter received by Miss Oliver, dated July 31, 1926, signed by the defendant Orton E. Goodwin, and which letter was objected to on the ground that it was hearsay and without proper foundation, and as incompetent, which objection was overruled, [272] and to which ruling the defendants duly and regularly excepted.

EXCEPTION No. 76.

That the Court erred in limiting the cross-examination of the witness, Miss Oliver, which more fully appears as follows:

Mr. HARRIS.—One of these transactions that you wanted to keep from your sister's mind and attention occurred some time back along in June or May, did it not?

Mr. SWEENEY.—That is objected to as imma-

terial, irrelevant and incompetent, and particularly that it has been asked and answered.

Mr. HARRIS.—This is a preliminary question, and will tie up perfectly with counsel's examination.

The COURT.—I cannot see the object of that question, how it bears on the issues.

Mr. HARRIS.—If I disclose the object I might as well not examine on it.

The COURT.—I will sustain the objection to it.

Mr. HARRIS.—Exception to the Court's ruling.

To which ruling of the Court, the defendants duly and regularly excepted.

EXCEPTION No. 77.

That the Court erred in receiving in evidence U. S. Exhibit No. 81, which was a signature card of Cromwell Simon & Company and a copy of the bank account of the Pacific National Bank, which was objected to as hearsay and without foundation, which objection was overruled and to which ruling the defendants duly and regularly excepted.

EXCEPTION No. 78.

That the Court erred in the receiving in evidence of [273] Government's Exhibits 85 and 86, to which the defendants objected as hearsay and without foundation, and which exhibits were marked Exhibits "HH" and "II" in the indictment.

The objection was overruled, and to which overruling the defendants duly and regularly excepted.

EXCEPTION No. 79.

That the Court erred in receiving in evidence the

testimony of the witness Mary Christiansen, with respect to Government Exhibit No. 28, which testimony was objected to upon the ground that it was a privileged communication, as more fully appears as follows:

Mr. HARRIS.—If your Honor please, I assume that this comes under that blanket objection to all of Mrs. Christiansen's previous testimony, that she is a servant and stenographer, and therefore it is privileged; we stipulated once that all of her testimony would be subject to that objection.

The COURT.—That is satisfactory.

Mr. HARRIS.—And it is overruled and an exception noted.

EXCEPTION No. 80.

That the Court erred in admitting certain testimony over the objection of the defendants, as more fully appears as follows:

The COURT.—I have here the record showing the circumstances under which U. S. Exhibit was received in evidence, that this letter was presented at the hearing by Mr. Cromwell Simon, Mr. Harry Kassmir being present.

Mr. SWEENEY.—Yes.

The COURT.—Mr. Sweeney will be permitted to read that exhibit. The objection of Mr. McDonald is overruled. Do you want to make an objection, Mr. Harris?

Mr. HARRIS.—I have made an objection, your Honor. I renew [274] the objection formerly made, and ask the Court at this time to direct the jury that that should not be held as testimony

against the defendant Randolph, on the grounds that I have tested.

Mr. McMILLAN.—We join in that objection, your Honor.

Mr. SWEENEY.—Those motions have already been made and your Honor has ruled on them, and it is part of the *res gestae* of the whole scheme.

The COURT.—The reason why it was received is shown in the record. The matter of instruction of the jury, that is a matter of later instruction. Mr. Sweeney will be allowed to read the letter at this time.

Mr. SWEENEY.—I will read it. This is U. S. Exhibit 8. (Reading.)

Mr. HARRIS.—I do not want to interrupt counsel, but I do want the record to show that the defendant Randolph excepts to the ruling of the Court refusing to instruct the jury as to the manner in which this is received, and to the permission of the District Attorney to read it.

Mr. McMILLAN.—And may we have the same exception, your Honor?

The COURT.—Yes.

EXCEPTION No. 81.

That the Court erred in receiving in evidence U. S. Exhibit No. 89, which was a certificate of Cromwell Simon & Company, dated August 4, 1925, issued to George Bernard, which certificate was objected to as incompetent, irrelevant, immaterial, and hearsay, and which objection was overruled, and to which overruling, an exception was duly and regularly taken.

EXCEPTION No. 82.

That the Court erred in admitting in evidence, certain testimony over objection of defendants, as follows: [275]

Q. Will you tell us what Mr. Randolph and Mr. Kassmir said on that occasion?

Mr. McMILLAN.—Objected to on the ground that it is immaterial, irrelevant, incompetent, hearsay, and also that it is too remote, so far as the defendant Robinson is concerned.

The COURT.—The objection is overruled.

Mr. McMILLAN.—Exception.

To which ruling the defendants then and there duly and regularly excepted.

EXCEPTION No. 83.

That the Court erred in admitting in evidence certain testimony over the objection of the defendants, as more fully appears as follows:

Q. Go ahead and tell us the conversation you had on that occasion.

Mr. McMILLAN.—Objected to on the ground it is immaterial, irrelevant, and incompetent, and hearsay.

The COURT.—The objection is overruled.

Mr. McMILLAN.—Exception.

To which ruling the defendants then and there duly and regularly excepted. [276]

EXCEPTION No. 84.

That the Court erred in admitting in evidence certain testimony over the objections of these defendants, as will more fully appear, as follows; and

EXCEPTION No. 85.

likewise erred in denying motion to strike out the testimony given, as will more fully appear, as follows:

Q. Can you give me the approximate time?

A. I think it was the latter part of August, along in August.

Q. What was the conversation had on that occasion?

Mr. McGEE.—The defendant Goodwin objects to this as immaterial, irrelevant, and incompetent, and hearsay as far as the defendant Goodwin is concerned, and upon the further ground that the conversation took place after Goodwin had severed his employment with Cromwell Simon & Company.

Mr. McMILLAN.—The defendant Robinson adopts the objection.

The COURT.—The objection is overruled.

Mr. McGEE.—Exception.

Mr. McMILLAN.—Exception.

Mr. SWEENEY.—Would you answer the question?

A. What was the question?

Mr. SWEENEY.—Would your Honor have the reporter read the question?

The COURT.—Read the question.

(The record was here read by the reporter.)

A. They told us they had established a bank in Reno, and that it would be quite an asset to us, because we would receive from 8 to 12 per cent on our money quarterly, and also on the common stock we would get at least 25 per cent—

Mr. HARRIS.—Just a moment, I move to strike out that testimony as not being competent in this proceeding, because it is not [277] one of the false pretenses alleged to have been made by any of the defendants in the alleged scheme to defraud which is set forth in the indictment, and therefore my defendant has not had an opportunity to prepare a defense to this.

Mr. McDONALD.—The defendant Kassmir joins in the objection.

Mr. McGEE.—The defendant Goodwin joins in the objection, likewise.

Mr. McMILLAN.—And the defendant Robinson joins in it.

The COURT.—The objection is overruled.

Mr. HARRIS.—Exception.

Mr. McGEE.—Exception.

Mr. McDONALD.—Exception.

Mr. McMILLAN.—Exception.

Mr. SWEENEY.—Q. You may continue.

A. He, Mr. Randolph said, "Harry, don't be too optimistic," and Mr. Kassmir says, "No, I am not. I know it, and it will be a good investment for them." So they took our certificates and made us new certificates later on.

To which rulings, defendants then and there duly and regularly excepted.

EXCEPTION No. 86.

That the Court erred in admitting in evidence certain testimony over the objections of these defendants, as will more fully appear, as follows:

Q. What was said and done on the occasion of that visit, Miss Durham?

Mr. McGEE.—The defendant Goodwin objects on the ground it is immaterial, irrelevant, and incompetent, and hearsay, as far as the defendant Goodwin is concerned, he having severed his employment with Cromwell Simon & Company on July 2, 1925, and it not being binding on him. [278]

Mr. HARRIS.—We object on behalf of the defendant Robinson on the ground the foundation has not been laid as to time.

Mr. McDONALD.—The defendant Kassmir joins in that objection.

Mr. SWEENEY.—Q. Can you fix the time of this visit, Miss Durham—approximately?

Q. Pardon me?

A. In December.

Q. Now, will you just tell us what was said and done on that occasion?

The COURT.—The objection is overruled.

Mr. McGEE.—The defendant Goodwin renews the objection made to the previous question.

The COURT.—The same ruling.

Mr. HARRIS.—If your Honor please, I want the objection there that the foundation has not been laid as yet.

The COURT.—Q. What year was that, the summer of what year?

A. In 1925.

The COURT.—The objection is overruled.

Mr. McGEE.—Exception.

Mr. SWEENEY.—Continue, Miss Durham.

A. We went to the office and the papers, I think, were all made up ready for signature.

Q. What conversation was had at that time?

A. Kassmir said, "Now, we have got everything all ready, and Mr. Robinson is going to get the loan for you, and really I think he has got the loan—haven't you, Mr. Robinson?" And he said, "Yes, it is made over in Oakland; we have secured it at 7 per cent and pay the interest monthly." Now, he says to my aunt, "Sign there."

To which rulings, defendants then and there duly and regularly excepted. [279]

EXCEPTION No. 87.

That the Court erred in admitting in evidence Government's Exhibit No. 4 for identification, over the objections of these defendants, as will more fully appear, as follows:

Mr. SWEENEY.—If your Honor please, I want to offer in evidence Government's Exhibit No. 4 for identification as Government's exhibit next in order.

Mr. McGEE.—I object to it on behalf of the defendant Goodwin as immaterial, irrelevant, and incompetent, and hearsay as far as the defendant Goodwin is concerned, it appearing to be a certificate issued by Cromwell & Co., dated the 7th day of August, 1925; Goodwin never was employed by Cromwell & Co., and he cannot be bound by any transactions of that concern.

Mr. McMILLAN.—On behalf of Robinson, it is objected to as hearsay, and the proper foundation has not been laid.

Mr. HARRIS.—I adopt the objections already made on behalf of the defendant Randolph.

The COURT.—The objection is overruled and it will be received in evidence as Government's exhibit next in order.

Mr. HARRIS.—Exception.

Mr. McMILLAN.—Exception.

Mr. McGEE.—Exception.

(The document was marked U. S. Exhibit 91.)

To which rulings defendants then and there duly and regularly excepted.

EXCEPTION No. 88.

That the Court erred in admitting in evidence U. S. Exhibit 40 for identification over the objections of these defendants, as will more fully appear, as follows:

Mr. SWEENEY.—At this time, your Honor, I wish to offer in [280] evidence U. S. Exhibit No. 40 for identification.

Mr. McGEE.—I make the same objection as I made to the offer of the previous certificate of Cromwell & Company.

Mr. HARRIS.—The same objection.

Mr. McMILLAN.—The same objection on behalf of the defendant Robinson.

The COURT.—The same ruling, and it will be received as U. S. Exhibit next in order.

Mr. McGEE.—Exception.

Mr. HARRIS.—Exception.

Mr. McMILLAN.—Exception.

(The document was marked U. S. Exhibit 92.)

To which rulings, defendants then and there duly and regularly excepted.

EXCEPTION No. 89.

That the Court erred in admitting in evidence certain testimony over the objections of these defendants, as will more fully appear as follows:

Q. Did you have a conversation with Mr. Kassmir concerning the certificates? A. Yes.

Q. What was the conversation you had with them?

Mr. HARRIS.—I do not understand even approximately what time this is. I will ask counsel to lay the foundation a little bit further with the witness.

Mr. SWEENEY.—Q. At what time was this conversation with Mr. Kassmir?

The COURT.—Q. What month or what year?

A. November or December.

Q. Of what year? A. 1925.

Mr. HARRIS.—Then, if your Honor please, I reserve that blanket objection on the ground that any conspiracy and scheme [281] had ended then; according to your Honor's ruling, the District Attorney will have to connect that up.

Mr. McMILLAN.—We make the same objection.

The COURT.—The District Attorney has made the statement to the Court he was going to have it continue until the 8th of March, 1927.

Mr. HARRIS.—I merely want to preserve the record on that point, exception.

Mr. SWEENEY.—May the reporter read the question?

The COURT.—Read the question.

(Last question repeated by the reporter.)

Mr. SWEENEY.—Go ahead.

A. I phoned Mr. Kassmir at Mr. Robinson's office and told him—

Q. Just tell the conversation.

A. (Continuing.) —to come over to the house.

Thereupon the witness continued to give a conversation which is fully set forth in the bill of exceptions on file herein, and to which reference is hereby expressly made.

To which rulings, defendants then and there duly and regularly excepted.

EXCEPTION No. 90.

That the Court erred in admitting in evidence Government's Exhibit No..24 for identification, over the objections of these defendants, as will more fully appear, as follows:

Q. I show you Government's Exhibit No. 24 for identification, Miss Durham, and ask you if you can identify that. A. I can.

Q. How did you receive that?

A. By mail at 5838 Birch Court, Oakland.

Q. When? A. In February.

Mr. McGEE.—Q. What is the date?

Mr. SWEENEY.—February 2, 1926. [282]

Mr. SWEENEY.—I want to offer in evidence Government's Exhibit No. 24 for Identification.

Mr. McGEE.—Defendant Goodwin objects on the ground it is immaterial, irrelevant, and incompetent, and hearsay as far as the defendant Good-

win is concerned, it is a letter written on the stationery of Charles Wesley Company, with which he was never connected, and subsequent to July 2, 1925, at which time he severed his connection with Cromwell Simon & Co.

Mr. McMILLAN.—The defendant Robinson objects on the ground it is hearsay, and the proper foundation has not been laid as to him.

Mr. McDONALD.—The defendant Kassmir joins in the last objection.

The COURT.—The objections are overruled, and it will be received in evidence as Government's exhibit next in order.

Mr. McMILLAN.—Exception.

Mr. McGEE.—Exception.

Mr. McDONALD.—Exception.

(The document was marked U. S. Exhibit 95.)

To which ruling, defendants then and there duly and regularly excepted.

EXCEPTION No. 91.

That the Court erred in admitting in evidence U. S. Exhibit 96, over the objections of these defendants, as will more fully appear, as follows:

Mr. SWEENEY.—Q. Do you know when you received it, approximately?

Mr. HARRIS.—She has already stated some time in February. Objected to as already asked and answered.

Mr. SWEENEY.—Q. What year?

A. 1926. [283]

Mr. SWEENEY.—I offer it in evidence as Gov-

ernment's exhibit next in order, the signature having been admitted.

Mr. McGEE.—The defendant Goodwin objects on the ground it is immaterial, irrelevant, and incompetent, and hearsay as far as the defendant Goodwin is concerned, it being subsequent to the time that the defendant Goodwin left the employ of Cromwell Simon & Co.

The COURT.—The objection is overruled.

Mr. McMILLAN.—On behalf of the defendant Robinson I will also object on the same grounds—I will object on the same grounds—I will object on the ground it is hearsay and the proper foundation not laid.

The COURT.—Overruled.

Mr. McGEE.—Exception.

Mr. McMILLAN.—Exception.

The COURT.—It will be received in evidence as Government's exhibit next in order.

(The document was marked U. S. Exhibit 96.)

To which rulings, defendants then and there duly and regularly excepted.

EXCEPTION No. 92.

That the Court erred in admitting in evidence U. S. Exhibit 97, over the objections of these defendants, as will more fully appear, as follows:

Q. I will show you this letter, U. S. Exhibit 25 for Identification, and ask you if you can identify that. A. I can.

Q. How did you receive that?

A. Through the mails by special delivery at 5838 Birch Court, Oakland.

Q. Can you identify that envelope? A. I do.

The COURT.—Q. That was the envelope in which the letter came, was it?

A. Yes. [284]

Mr. SWEENEY.—At this time I offer in evidence Government's Exhibit No. 25 for Identification as Government's exhibit next in order.

Mr. McGEE.—The defendant Goodwin objects on the ground it is immaterial, irrelevant, and incompetent, and hearsay as far as the defendant is concerned. This letter is dated February 19, 1926, and is on the letter-head of the Charles Wesley Company; Goodwin never was in the employ of Charles Wesley Company, or of Cromwell Company.

Mr. SWEENEY.—This is on the letter-head of Allen Company.

Mr. McGEE.—I mean Allen Company; I object to it as immaterial, irrelevant, and incompetent, and I repeat for the record the objection previously made.

Mr. SWEENEY.—That does not include that Goodwin did not work for the Allen Company?

Mr. McGEE.—Yes.

Mr. McMILLAN.—The defendant Robinson objects that the proper foundation has not been laid, and it is hearsay.

Mr. HARRIS.—The defendant Randolph objects on the ground that it is hearsay as far as he is concerned, and beyond the time of consummation of any scheme or conspiracy.

The COURT.—The objection will be overruled

and it will be received in evidence as Government's exhibit next in order.

Mr. HARRIS.—Exception.

Mr. McGEE.—Exception.

Mr. McMILLAN.—Exception.

(The document was marked U. S. Exhibit 97.)

To which ruling, defendants then and there duly and regularly excepted.

EXCEPTION No. 93.

That the Court erred in admitting in evidence U. S. [285] Exhibit 98 over the objections of these defendants, as will more fully appear, as follows:

Mr. SWEENEY.—Q. I will show you Government's Exhibit No. 26 for Identification, and ask you if you can identify that.

A. I can.

Q. How did you receive it?

A. By mail, special delivery, at 5838 Birch Court, Oakland.

Q. When?

A. I won't be positive, I think Sunday.

Q. I know, but what date, what time of the year?

A. It must have been in March.

Q. Of what year? A. 1926.

Mr. SWEENEY.—The signature is already identified, your Honor.

The COURT.—That envelope was received with it at the same time?

Mr. SWEENEY.—Q. Did this letter come in this envelope?

A. Yes.

Mr. SWEENEY.—At this time I want to offer in evidence Government's Exhibit No. 26 for Identification.

Mr. McGEE.—The defendant Goodwin objects on the ground it is immaterial, irrelevant, incompetent, and hearsay, so far as the defendant Goodwin is concerned.

Mr. HARRIS.—The same objection.

Mr. McMILLAN.—The same objection.

The COURT.—The objection is overruled and it will be received in evidence as Government's exhibit next in order.

Mr. McGEE.—Exception.

Mr. McMILLAN.—Exception.

Mr. HARRIS.—Exception.

(The document was marked U. S. Exhibit 98.)

To which ruling, defendants then and there duly and [286] regularly excepted.

EXCEPTION No. 94.

That the Court erred in admitting in evidence U. S. Exhibit 99, over the objections of these defendants, as will more fully appear, as follows:

Mr. SWEENEY.—I will show you that letter and ask you *if recognize* it.

A. Yes.

Q. How did you receive it?

A. By mail, at 5838 Birch Court.

Q. Where? A. Oakland.

Q. When did you receive it?

A. In April, it might have been in the last of March or April.

Q. What year? A. 1926.

Mr. SWEENEY.—At this time, if your Honor please, I would like to offer in evidence a letter dated April 19, 1926, as Government's exhibit next in order.

Mr. McGEE.—On behalf of the defendant Goodwin the objection is made that it is immaterial, irrelevant, and incompetent, and hearsay, as far as the defendant Goodwin is concerned.

The COURT.—Was that letter received through the mail?

A. Yes.

The COURT.—Overruled.

Mr. McGEE.—Exception.

Mr. McMILLAN.—As to the defendant Robinson, it is objected to as hearsay, and the proper foundation not laid.

The COURT.—The same ruling on the objection.

Mr. McMILLAN.—Exception.

The COURT.—It will be received in evidence as Government's exhibit next in order.

(The document was marked U. S. Exhibit 99.)

To which rulings, defendants then and there duly and regularly excepted. [287]

EXCEPTION No. 95.

That the Court erred in admitting in evidence U. S. Exhibit 100, over the objections of these defendants, as will more fully appear, as follows:

Q. I show you this letter, and ask you if you can identify that. A. I can.

Q. How did you receive this letter?

A. By mail at 5838 Birch Court, Oakland.

Q. Can you identify the envelope? A. Yes.

Q. Where did you receive it? A. Oakland.

Q. When, as best you can remember?

A. Well, April or May.

Q. What year? A. 1926.

Mr. SWEENEY.—We offer it in evidence as U. S. exhibit next in order, if your Honor please.

Mr. McGEE.—That is objected to on behalf of the defendant Goodwin as immaterial, irrelevant, and incompetent, and hearsay, as far as he is concerned.

Mr. McMILLAN.—That is objected to by the defendant Robinson on the ground it is hearsay and too remote, and the proper foundation has not been laid.

Mr. HARRIS.—That is objected to by the defendant Randolph on the ground it is too remote.

The COURT.—The objection will be overruled and it will be received as Government's exhibit next in order.

Mr. McGEE.—Exception.

Mr. HARRIS.—Exception.

Mr. McMILLAN.—Exception.

(The document was marked U. S. Exhibit 100.)

EXCEPTION No. 96.

That the Court erred in admitting in evidence U. S. Exhibit 101, over the objections of these de-

fendants, as will [288] more fully appear, as follows:

The witness testified the letter was addressed to Mrs. Emily A. Beans, and came through the mail, and was received at 5838 Birch Court, Oakland, in May or June, in the envelope identified. Thereupon the following objections were made and rulings had:

Mr. McMILLAN.—The defendant Robinson objects to it as too remote, and the proper foundation not being laid.

Mr. SWEENEY.—I have not offered it yet. At this time I offer in evidence Government's Exhibit No. 27 for Identification.

Mr. McGEE.—Defendant Goodwin objects on the ground it is immaterial, irrelevant, and incompetent, and hearsay as far as the defendant Goodwin is concerned, and it is dated June 26, at Pasadena, and as far as the defendant Goodwin is concerned it is hearsay.

Mr. McMILLAN.—We renew the objection made before the offer as too remote, and the proper foundation not laid.

The COURT.—The objection will be overruled and it will be received in evidence as Government's exhibit next in order.

Mr. McGEE.—Exception.

Mr. McMILLAN.—Exception.

(The document was marked U. S. Exhibit 101.)

To which rulings, defendants then and there duly and regularly excepted.

EXCEPTION No. 97.

That the Court erred in admitting in evidence U. S. Exhibit 102, over the objections of these defendants, as will more fully appear as follows:

The witness testified the letter was received by mail in the envelope identified, in June or July of 1926, at 5838 [289] Birch Court, Oakland.

Mr. SWEENEY.—The signature has already been identified, your Honor. At this time I want to offer in evidence Government's Exhibit 28 for Identification.

Mr. McGEE.—The defendant Goodwin objects on the ground it is immaterial, irrelevant and incompetent, and hearsay as far as the defendant Goodwin is concerned.

Mr. McMILLAN.—The same objection as far as Robinson is concerned.

Mr. HARRIS.—The defendant Randolph also objects on the ground it is hearsay as to him, and too remote.

The COURT.—The objection is overruled, and it will be received in evidence as Government's exhibit next in order.

Mr. HARRIS.—Exception.

Mr. McGEE.—Exception.

Mr. McMILLAN.—Exception.

(The document was marked U. S. Exhibit 102.)

To which rulings, defendants then and there duly and regularly excepted.

EXCEPTION No. 98.

That the Court erred in admitting in evidence U. S. Exhibit 103, over the objections of these de-

fendants, as will more fully appear, as follows:

The witness testified that two papers identified by her were given to her by Mr. Robinson.

The COURT.—Did Mr. Robinson hand you those two papers?

A. Yes.

Mr. SWEENEY.—At this time I offer in evidence Government's Exhibit No. 29 for Identification, the signature having been identified.

Mr. HARRIS.—That is objected to on behalf of the defendant Randolph on the ground no foundation has been laid, immaterial, [290] irrelevant, and incompetent, and hearsay as to him.

Mr. McGEE.—Objected to on the ground it is immaterial, irrelevant, and incompetent, and hearsay, as far as the defendant Goodwin is concerned, no foundation has been laid. This refers to one of the counts of the indictment which alleges that it was sent through the mail, and, according to the testimony of the witness it did not go through the mail, and I object to it being introduced in evidence on that ground.

Mr. McMILLAN.—Objected to on the latter ground, only, that the proper foundation has not been laid to show that offense has been committed, whatever, against the United States under the allegations of this indictment, so far as that letter is concerned.

Mr. McDONALD.—The objection will be overruled, and it will be received as Government's exhibit next in order.

Mr. McGEE.—Exception.

Mr. McDONALD.—Exception.

Mr. HARRIS.—Exception.

Mr. McMILLAN.—Exception.

(The document was marked U. S. Exhibit 103.)

To which rulings, defendants then and there duly and regularly excepted.

EXCEPTION No. 99.

That the Court erred in admitting in evidence U. S. Exhibit 104, over the objections of these defendants, as will more fully appear, as follows:

The witness, Allen, testified that he was an attorney at law, with offices in Oakland, 902 Syndicate Building, that he could identify the letter mentioned, and that it was received in the mails at his office at approximately the time of its date, March 8, 1927, and that he could identify the envelope which came [291] with it.

Mr. SWEENEY.—If your Honor please, I want to offer in evidence Government's Exhibit No. 39 for Identification.

Mr. McGEE.—On behalf of the defendant Goodwin, it is objected to as immaterial, irrelevant, and incompetent, and hearsay as far as Goodwin is concerned, it being dated March, 1927, a date subsequent to the time Goodwin severed his connection with Cromwell Simon & Co.

Mr. HARRIS.—I would like to note the objection that it is too remote as to the defendant Randolph.

The COURT.—The objection will be overruled, and it will be received in evidence as U. S. exhibit next in order.

Mr. HARRIS.—Exception.

Mr. McGEE.—Exception.

(The document was marked U. S. Exhibit 104.)

To which rulings, defendants then and there duly and regularly excepted.

EXCEPTION No. 100.

That the Court erred in admitting into evidence certain testimony over the objections of these defendants, as will more fully appear, as follows:

Q. Miss Durham, how much money did you invest in Cromwell Simon & Co.?

Mr. McGEE.—Objected to as immaterial, irrelevant, and incompetent, and on the further ground it is hearsay as far as the defendant Goodwin is concerned, and it does not respond to any allegation contained in the indictment in this case.

Mr. McDONALD.—The further objection it is assuming something not in evidence.

Mr. McGEE.—And further, it calls for the conclusion of the witness. [292]

Mr. HARRIS.—I adopt the objection, and assign it as an attempt to prejudice the mind of the jury.

Mr. McMILLAN.—The defendant Robinson adopts the objection.

The COURT.—Read the question. (Last question repeated by the reporter.) The objection is overruled.

Mr. HARRIS.—Exception.

Mr. McMILLAN.—Exception.

Mr. McGEE.—Exception.

A. Do I understand the question to be as to myself?

Mr. SWEENEY.—Q. You, yourself.

A. $3,000.

To which ruling, defendants then and there duly and regularly objected.

EXCEPTION No. 101.

That the Court erred in admitting into evidence certain testimony over the objections of these defendants, as will more fully appear, as follows:

Q. How much did yourself and your aunt invest, if you know of your own knowledge?

A. About $12,060-odd—$12,056.

Q. Did you ever get any of that money back?

Mr. McGEE.—Objected to as immaterial, irrelevant, and incompetent, and hearsay as far as the defendant Goodwin is concerned, and it does not respond to any allegation of the indictment.

Mr. McDONALD.—The same objection on behalf of the defendant Kassmir.

Mr. McMILLAN.—The same objection on behalf of the defendant Robinson.

The COURT.—The objection is overruled.

Mr. McGEE.—Exception.

Mr. McDONALD.—Exception.

Mr. McMILLAN.—Exception. [293]

A. No.

To which ruling, defendants then and there duly and regularly excepted.

EXCEPTION No. 102.

That the Court erred in limiting the cross-exami-

nation of the witness, Durham, and in sustaining the objection to questions asked on cross-examination, as will more fully appear, as follows:

Q. How many times did you see Mrs. Williamson about selling her stock? Maybe that would clear your mind.

Mr. SWEENEY.—That is objected to as not proper cross-examination, your Honor.

Mr. HARRIS.—I am trying to fix the date.

Mr. SWEENEY.—Mrs. Williamson has not entered into this controversy, at all.

The COURT.—I will sustain the objection.

Mr. HARRIS.—Q. Do you know how many times you saw Mr. Williamson about selling stock?

Mr. SWEENEY.—Objected to on the ground it is immaterial, irrelevant, and incompetent, and not proper cross-examination.

Mr. HARRIS.—I am testing the memory of the witness.

The COURT.—I will sustain the objection.

Mr. HARRIS.—Exception to both of the Court's rulings, if your Honor please.

To which rulings, defendants then and there duly and regularly excepted.

EXCEPTION No. 103.

That the Court erred in limiting the cross-examination of the witness, Durham, and in sustaining objections to questions asked, as will more fully appear, as follows:

Q. But you took him around to some other people besides your [294] clients, then: Is that it?

Mr. SWEENEY. — Objected to as not proper cross-examination.

Mr. HARRIS.—I think it is, if your Honor please. This woman has given the impression to the jury that she was imposed upon, and I desire to show that she had business training, and knew what she was doing.

The COURT.—I will sustain the objection.

Mr. HARRIS.—Exception.

A. Two other persons—

The COURT.—Just a minute. The answer goes out.

To which rulings, defendants then and there duly and regularly excepted.

EXCEPTION No. 104.

That the Court erred in limiting the cross-examination of the witness, Durham, and in sustaining objections to questions on cross-examination, as will more fully appear, as follows:

Mr. HARRIS.—Q. Are you familiar with what a mortgage looks like, from what it contains?

Mr. SWEENEY. — The same objection, immaterial, irrelevant, and incompetent, and it is not proper cross-examination.

The COURT.—I will sustain the objection.

Mr. HARRIS.—I will except to the Court's ruling.

To which ruling, defendants then and there duly and regularly excepted. [295]

EXCEPTION No. 105.

The Court erred in admitting in evidence certain

testimony over the objections of the defendants, which more fully appears as follows:

Mr. SWEENEY.—Q. Of your own knowledge, how many letters did your aunt, Mrs. Beans, write to Mr. Randolph in Los Angeles?

Mr. HARRIS.—That is objected to as immaterial, irrelevant, and incompetent, and as being indefinite as to time.

Mr. McGEE.—The defendant Goodwin objects on the grounds stated in the previous objection to the last question.

Mr. SWEENEY.—Q. After April 1, 1925, Miss Durham.

Mr. HARRIS.—That is still objected to.

The COURT.—The objection is overruled.

Mr. McGEE.—Exception.

Mr. HARRIS.—Exception.

A. Five or six.

To which ruling of the Court the defendant then and there duly and regularly excepted.

EXCEPTION No. 106.

That the Court erred in admitting in evidence certain testimony over the objection of the defendant, which more fully appears as follows:

Q. What was the conversation you had at that time with Mr. Randolph or Mr. Kassmir and Mr. Randolph?

Mr. McGEE.—The defendant Goodwin objects to that on the ground it is immaterial, irrelevant, and incompetent, and hearsay as far as the defendant Goodwin is concerned, he not being an employee of Cromwell Simon & Co. at that time.

Mr. HARRIS.—That is objected to as assuming something not in evidence. There is no evidence here of any conversation with [296] Mr. Randolph and Mr. Kassmir concerning this $1500 loan.

Mr. SWEENEY.—This lady testified that she sat in Mr. Robinson's office for a considerable length of time with the door ajar, in which the $1500 was the subject of the conversation.

The COURT.—The objection is overruled.

Mr. McGEE.—Exception.

Mr. HARRIS.—Exception.

To which ruling of the Court the defendant then and there duly and regularly excepted.

EXCEPTION No. 107.

The Court erred in admitting in evidence certain testimony over the objection of the defendant, which more fully appears as follows:

Mr. SWEENEY.—I will attempt to do that later.

Q. How many mortgaged were there on the house, if you know, at Birch Court?

Mr. McDONALD.—Objected to as immaterial, irrelevant, and incompetent, and not within the issues laid in this indictment.

Mr. McGEE.—The defendant Goodwin makes the same objection, and that it is hearsay.

Mr. HARRIS.—The same objection.

The COURT.—The objection is overruled.

Mr. HARRIS.—Exception.

Mr. McGEE.—Exception.

Mr. McDONALD.—Exception.

To which ruling of the Court the defendant then and there duly and regularly excepted. [297]

EXCEPTION No. 108.

The Court erred in admitting in evidence certain testimony over the objection of the defendant, which more fully appears as follows:

Q. Did you ever do any printing for the Charles Wesley Company at Los Angeles? A. Yes.

Q. Who ordered that printing?

Mr. McGEE.—The defendant Goodwin objects on the ground it is immaterial, irrelevant, and incompetent, and hearsay as far as the defendant Goodwin is concerned, he not having been in any way connected with Charles Wesley Company.

The COURT.—The objection is overruled.

Mr. McGEE.—Exception.

To which ruling of the Court the defendant then and there duly and regularly excepted.

EXCEPTION No. 109.

That the Court erred in limiting the cross-examination of the witness McClintock, as more fully appears as follows:

Q. Mr. Kassmir told you that he would arrange to get you a job down in Los Angeles?

Mr. SWEENEY.—Objected to as immaterial, irrelevant, and incompetent, and assuming something not in evidence.

Mr. HARRIS.—I can assume, upon cross-examination, anything for the purpose of the cross-examination. I do not have to stick to the evidence; and, as counsel has made that objection so many times—

The COURT.—I will sustain the objection.

To which ruling of the Court the defendant then and there duly and regularly excepted. [298]

EXCEPTION No. 110.

That the Court erred in limiting the cross-examination of the witness W. C. Owens, as more fully appears as follows:

Q. Did you follow Cromwell Simon, or Mr. Kassmir, or either one or both of them to the stock market in the morning to see whether they made purchases of stock? A. No.

Mr. SWEENEY.—Objected to as immaterial, irrelevant, and incompetent, and assuming something not in evidence, that Mr. Cromwell Simon or Mr. Kassmir went to the stock office in the morning.

The COURT.—I will sustain the objection.

Mr. HARRIS.—Exception.

Q. Did you go to the Corporation Department to ascertain the standing of the concern? A. No.

Q. You saw an ordinary and usual brokerage business there conducted in the ordinary and usual way, and you assumed it was conducted that way?

Mr. SWEENEY.—Objected to as immaterial, irrelevant, and incompetent, and calling for the conclusion of the witness, that it was an ordinary brokerage firm.

The COURT.—I will sustain the objection.

To which ruling of the Court the defendant then and there duly and regularly excepted.

EXCEPTION No. 111.

The Court erred in admitting in evidence certain

testimony over the objection of the defendant, which more fully appears as follows:

Q. Did you conduct an investigation of these defendants, Mr. Maderia?

Mr. McGEE.—That is objected to as immaterial, irrelevant [299] and incompetent, and hearsay.

Mr. HARRIS.—The same objection.

The COURT.—The objection is overruled.

Mr. McGEE.—Exception.

Mr. HARRIS.—Exception.

A. I conducted an investigation into Cromwell Simon & Co., in which these particular defendants were interested, and connected with.

Mr. HARRIS.—Just a moment, I ask that the answer "these defendants were interested" be stricken out as calling for a conclusion of the witness.

To which ruling of the Court the defendant then and there duly and regularly excepted.

EXCEPTION No. 112.

The Court erred in admitting in evidence certain testimony over the objection of the defendant, which more fully appears as follows:

Q. Did you, on that occasion, have a conversation with Mr. Randolph relative to the Cromwell Simon Company of San Francisco?

Mr. McMILLAN.—As to the defendant Robinson, that is objected to on the ground it is hearsay. Have you called for the conversation?

Mr. SWEENEY.—No, I am asking if he had a conversation.

To which ruling of the Court the defendant then and there duly and regularly excepted.

EXCEPTION No. 113.

The Court erred in admitting in evidence U. S. Exhibit No. 107 for the reasons that it is immaterial, irrelevant, and hearsay as to the defendants.

To which ruling of the Court the defendant then and there duly and regularly excepted. [300]

EXCEPTION No. 114.

The Court erred in admitting in evidence certain testimony over the objection of the defendant, which more fully appears as follows:

Q. What was the conversation had on that occasion?

Mr. McDONALD.—Objected to as immaterial, irrelevant, and incompetent, and the proper foundation has not been laid; this is a conversation that took place between an officer and a man in custody, and it has not been shown that it was free and voluntary, or without promise of immunity or reward.

Mr. McGEE.—I make the objection, unless the district attorney makes a stipulation in regard to the conversation that he did as to the other defendants.

Mr. SWEENEY.—That stipulation will be made. The conversation will bind only Mr. Kassmir, and no one else.

Mr. HARRIS.—We object that no foundation has been laid for the testimony of the witness under the circumstances that he has related.

Mr. McMILLAN.—We join in that objection.

The COURT.—The objection is overruled.

Mr. McMILLAN.—Exception.

Mr. HARRIS.—Exception.

To which ruling of the Court the defendant then and there duly and regularly excepted.

EXCEPTION No. 115.

The Court erred in admitting in evidence U. S. Exhibit No. 110, which is alleged to be a letter written by the defendant Robinson, the objection to which more fully appears as follows:

The COURT.—I do not see it in the record.

Mr. SWEENEY.—Q. Will you look at this? I will show you [301] this letter and ask you if you can identify it.

A. Yes.

Q. Is it a part of your files?

A. A part of our files.

Mr. SWEENEY. — Will the signature be admitted, Mr. McMillan?

Mr. McMILLAN.—Yes.

Mr. SWEENEY.—At this time I want to offer in evidence a letter; I will present it to your Honor, so that your Honor can read it and see its relevancy.

The COURT. — Is it admitted by the other defendants that this is the signature of Mr. Robinson?

Mr. HARRIS.—If Mr. McMillan says it is we admit it.

The COURT.—What is your attitude, Mr. McDonald?

Mr. McDONALD.—If Mr. McMillan says it is, we will admit it.

Mr. McGEE.—I make the same admission, except that Goodwin objects on the ground it is immaterial, irrelevant, and incompetent, and hearsay as far as the defendant Goodwin is concerned, it being at a date subsequent to the time that Goodwin severed all connection with Cromwell Simon & Company.

The COURT.—Are you offering it?

Mr. SWEENEY.—Yes.

Mr. HARRIS. — I object to it solely on the ground that it does not point to any of the alleged offenses set forth in the indictment, it is not one of the false pretenses set forth, and that none of these defendants are charged in any way with this transaction, immaterial, irrelevant, and incompetent.

The COURT.—The objection is overruled, and it will be received in evidence as Government's exhibit next in order.

Mr. McGEE.—Exception.

Mr. HARRIS.—Exception.

To which ruling of the Court the defendant then and there duly and regularly excepted. [302]

EXCEPTION No. 116.

That the Court erred in overruling and denying a motion on behalf of defendants Robinson and Randolph individually, which said motions and the rulings denying same more fully appears as follows:

Mr. McMILLAN.—At this time, at the close of

the Government's evidence in chief, the defendant Samuel H. Robinson moves this Court to direct the jury to find him not guilty upon each and every count contained in said indictment, excepting of course, counts 1 and 34, upon the following grounds:

1. That there is no evidence of sufficient substantiality to support a verdict and judgment of guilty if such verdict and judgment were found or made and rendered against said defendant on any of said counts.

2. No offense against the United States is charged in the indictment herein, or any of said counts, for the same reason, and upon the same grounds as set forth in the demurrer of said Samuel H. Robinson on file herein.

3. That no offense sought to be charged in the indictment herein, or any count thereof, has been proven.

4. The evidence adduced fails to prove a plan, or scheme, or artifice said to be set forth in said indictment and each count thereof.

5. The evidence fails to prove that said defendant Samuel H. Robinson at any time had any knowledge of any plan, or scheme, or artifice, as set forth in said indictment, or any count thereof, or that he ever entered into any such plan, scheme, or artifice as set forth in said indictment, or any count thereof, or that he ever knowingly aided, abetted or assisted in the furtherance or execution of any such plan, scheme or artifice. [303]

That the statements, representations and letters

that were made or mailed by said Samuel H. Robinson were not made or mailed knowingly pursuant to any general plan or scheme adopted or sanctioned by him.

That any acts, declarations, or statements made by said Samuel H. Robinson, or any letter alleged to have been mailed or received by said Samuel H. Robinson had no relation to and was not a step in any attempted execution or furtherance of any plan, or scheme, or artifice as alleged in said indictment, or any count thereof, or in furtherance or execution of any plan, scheme, or artifice.

Lastly, that the evidence in this case, so far as said Samuel H. Robinson is concerned, is as consistent with his innocence as it is with his guilt.

I respectfully submit the matter without argument.

Mr. HARRIS.—May it please the Court, without repeating each one of the motions made by the defendant Robinson, the defendant Randolph reiterates and adopts them as if fully stated at this time. However, at this time I would like to make a short argument upon the proposition.

(After argument).

Mr. McDONALD.—The defendant Kassmir joins in the motions made by the defendant Randolph, and makes the further motion that the counts of the indictment referring to the testimony of the witness Pike, or the witness Christensen, to all transactions concerning Mr. Robinson, be dismissed on the ground that all of the testimony that these counts refer to are privileged communications between at-

torney and client. Your Honor has already passed upon that motion, but this is merely renewing it for the purpose of the record; we ask that that evidence be at this time stricken out.

The COURT.—Are you offering anything else besides that motion? [304]

Mr. McDONALD.—I am joining in the motion of the defendant Randolph.

The COURT.—I presume in behalf of your own client.

Mr. McDONALD.—Yes.

The COURT.—There being nothing further, the jury may be returned.

(The jury was returned into court.)

The COURT.—The jurors being present in the jury-box, and the defendants being present, you may proceed. I believe at this time the only motion that is before the Court is that of Goodwin, for an instructed verdict. The same will be denied. Any further motions?

Mr. McGEE.—Exception.

Mr. McMILLAN.—May it please your Honor, I made a motion on behalf of the defendant Robinson, and for the reasons therein stated I move for a directed verdict upon all of the grounds stated, and each of the grounds stated in the motion.

The COURT.—The point is, you made it in the absence of the jury; you made such a statement and you wish to request an instructed verdict at this time before the jury?

Mr. McMILLAN.—Yes.

The COURT.—On the grounds that you have stated to the Court?

Mr. McMILLAN.—Yes.

The COURT.—The same will be denied.

Mr. McMILLAN.—Exception.

Mr. HARRIS.—The defendant Randolph makes a motion for an instructed verdict on the grounds stated to your Honor in the absence of the jury.

The COURT.—The same will be denied.

Mr. HARRIS. — Exception. At the same time we move to strike out all of the testimony in letters purporting on their face or [305] by the testimony of the witness to have been mailed after September 15, 1925, on behalf of the defendant J. W. Randolph, on the ground that as to him they are hearsay, and the mere relation of a conspirator, after the conspiracy or scheme has been consummated.

The COURT.—The motion will be denied.

Mr. McMILLAN.—The defendant Robinson joins in the motion just made by the defendant Randolph. substituting the name Robinson for Randolph.

The COURT.—The same ruling.

Mr. McMILLAN.—Exception.

EXCEPTION No. 117.

That the Court erred in refusing to receive in evidence certain testimony on behalf of the defendant Randolph, which more fully appears as follows:

Mr. SWEENEY.—Objected to as immaterial, irrelevant, and incompetent.

The COURT.—The objection is sustained.

Mr. HARRIS.—Q. How long did you continue to work for Cromwell Simon & Co.?

Mr. SWEENEY.—Objected to as immaterial, irrelevant, and incompetent, and not within the issues of the indictment; it is certainly not relevant how long he worked for them.

Mr. HARRIS.—I think it is very relevant to show under what conditions Cromwell Simon & Co. were conducted, because that is the gist of the Government's case.

The COURT.—I will sustain the objection.

Mr. HARRIS.—Exception.

EXCEPTION No. 118.

The Court erred in refusing to receive in evidence [306] certain testimony on behalf of the defendant Randolph, which more fully appears as follows:

Mr. HARRIS.—Q. State whether or not Jack Randolph rendered you any assistance in getting the money?

Mr. SWEENEY.—Objected to on the ground it is immaterial, irrelevant, and incompetent, and particularly that it is leading.

Mr. HARRIS.—It goes to the good faith of this defendant as to whether he was in any alleged scheme.

The COURT.—I will sustain the objection.

Mr. HARRIS.—Exception.

EXCEPTION No. 119.

The Court erred in refusing to receive in evidence certain testimony on behalf of the defendant Randolph, which more fully appears as follows:

Mr. HARRIS.—Q. Mr. Paddock, is it not a fact that the terms of sale include delivery of the stock?

Mr. SWEENEY.—Objected to as immaterial, irrelevant, and incompetent, and calling for the conclusion of the witness, also leading.

Mr. HARRIS.—It is based on counsel's own question a moment ago.

The COURT.—It is not the best evidence, and I will sustain the objection.

Mr. HARRIS.—I desire to note an exception.

To which ruling of the Court the defendant then and there duly and regularly excepted.

EXCEPTION No. 120.

That the Court erred in refusing the motion of the defendants to strike from the record Exhibit *No.* "SS.," dated March [307] 8th, 1927, being a letter written to Mr. Allen, the grounds of which motion more fully appear as follows:

Q. Calling your attention to a letter which you wrote to Mr. Allen across the bay, and which you are probably familiar with, Exhibit *No.* "SS," dated March 8, 1927—paragraph 3—I will read it to you and ask you if you are familiar with that paragraph—the paragraph is as follows:

> "Mrs. Beans and Miss Durham had entered into a contract with the firm of Cromwell Simon & Company for the purchase of different stocks

(I do not remember the dates, but will give them all to you later). Because of reputation that Mr. Simon had, unbeknown to me or to my associates there, the Corporation Department called Cromwell Simon & Company before them for a hearing and revoked their permit."

You say that is true? A. No.

Mr. HARRIS.—If your Honor please, this is a letter long after the alleged scheme had ended, and I move the Court that it be stricken out and the jury be instructed to disregard it, as far as my defendant is concerned.

The COURT.—What is the date of the letter?

Mr. SWEENEY.—It is dated March 8, 1927.

Mr. McGEE.—The same objection and motion on behalf of the defendant Goodwin.

The COURT.—The objection will be overruled.

Mr. HARRIS.—Exception.

Mr. McGEE.—Exception.

To which ruling of the Court the defendant then and there duly and regularly excepted.

EXCEPTION No. 121.

The Court erred in admitting in evidence certain testimony over the objections of defendants, as more fully appears as follows: [308]

Q. The certificates were dated August 7—from the letter of Mr. Robinson, which is dated August 26, that was the day upon which that order was given to Mr. Pike, was it not? You are familiar with that letter of August 26, are you not?

A. Yes.

Q. Who gave the order at that time?

A. I believe Mr. Simon.

Q. What became of the check of $3,800 that was paid by Mrs. Beans to Cromwell Simon & Co., or Cromwell & Co., if you know?

Mr. HARRIS.—That is objected to as calling for a conclusion; the check is in evidence and shows on the back thereof that it was deposited on the day following, in the Humboldt Bank.

Mr. McGEE.—I object to it on behalf of Goodwin as immaterial, irrelevant, and incompetent, and hearsay.

The COURT.—The objection is overruled.

Mr. McGEE.—Exception.

Mr. HARRIS.—Exception.

To which ruling of the Court the defendant then and there duly and regularly excepted.

EXCEPTION No. 122.

That the Court erred in denying the motions of the defendants Robinson and Randolph for a directed verdict of not guilty upon all the accounts upon which they were on trial, which said motion more fully appears as follows:

Mr. McMILLAN.—May it please your Honor, at this time, at the conclusion of all of the evidence in the case on behalf of the defendant Robinson I move for a directed verdict upon all of the grounds, and for the same reasons set forth in my motion for a directed verdict at the conclusion of the Government's case in chief.

The COURT.—Does each defendant want to do that?

Mr. McGEE.—On behalf of the defendant Goodwin I move on all of the grounds I moved at the conclusion of the prosecution's [309] case, that your Honor instruct the jury to return a verdict of not guilty on all of the counts as far as the defendant Goodwin is concerned.

The COURT.—You ask for a dismissal?

Mr. McMILLAN.—I ask for a directed verdict.

Mr. McGEE.—I ask for a directed verdict upon exactly the same grounds as I stated at the conclusion of the Government's case.

Mr. HARRIS.—The defendant Randolph adopts that motion, inserting the name Randolph instead of Robinson.

Mr. McDONALD.—The defendant Kassmir now renews all the motions made at the close of the Government's case.

The COURT.—I would rather rule on the motions Tuesday.

(With the usual admonition to the jury, an adjournment was taken until Tuesday, June 19, 1928, at ten o'clock A. M.)

Tuesday, June 19, 1928.

The COURT.—The motions of the defendants Kassmir, Robinson, and Randolph for an instructed verdict will be denied. The motion of defendant Goodwin for an instructed verdict will be granted.

Mr. McMILLAN.—May I note an exception on behalf of the defendant Robinson?

Mr. McDONALD.—An exception on behalf of the defendant Kassmir.

Mr. HARRIS.—An exception on behalf of the defendant Randolph, your Honor.

To which ruling of the Court the defendants and each of them, then and there duly and regularly excepted.

EXCEPTION No. 123.

That the Court erred in instructing the jury, wherein the Court charged the jury that an agent who tried to sell stock [310] acted in the capacity of a trustee, which instruction was as follows:

"Agents who buy and sell stock stand in the attitude of trustees obligated to good faith and honest dealings with those with whom they do business, and the law obligates such a trustee, when in that position, to the highest degree of good faith and honesty, with his associates. He must not conceal anything from them; he must not falsify anything to them. His duty is to take care of their interests; to advise them correctly; to keep correct accounts, and, above all, to keep accurate books, and be prepared to account for every dollar when the time comes. He is in the same position as a director of a corporation who is a trustee of the corporation."

To which instruction the defendants excepted as appears as follows:

Mr. HARRIS.—Now, if your Honor please, with the Court's permission, I would like to enter an exception to the Court's instruction—I had no way of having it by number, but the one which sets forth

that an agent who tried to sell stock acted in the capacity of a trustee; that, in effect, was the instruction. I would also like to except generally to the refusal of the Court to give any and all other instructions offered by the joint defendants, and refused to have been given.

The COURT.—I do not know whether a blanket objection like that would be of any value. Of course, the Court, in its instructions, endeavored to cover the entire field completely by giving every instruction which was pertinent to the issue. However, the exception can be noted by the reporter to the extent that counsel has expressed it.

To which ruling of the Court the defendant then and there duly and regularly excepted. [311]

EXCEPTION No. 124.

The Court erred in failing to give the following instruction which was requested by the defendants:

INSTRUCTION No. 16.

You are instructed that before one can be convicted of a crime by reason of the acts of another person who acts in his behalf, a clear case must be shown. The civil doctrine that a person is bound by the acts of his agent within the scope of the agent's authority has no application to criminal law. If a person is liable at all criminally for the acts of another, such liability must be founded upon authorized acts. Authority to do a criminal act will not be presumed.

You are instructed that the charges contained in the indictment are based upon alleged violations of Sec. 215 of the Criminal Code, without the element of conspiracy. You are therefore, instructed that before you can find the defendant J. W. Randolph guilty of any of said charges you must find first that the false pretense in the indictment were made directly by defendant Randolph, or that they were directly authorized or consented to by the defendant Randolph, and in the latter event a clear case must be shown.

People vs. Green, 22 Cal. App. 45, 50.
People vs. Doble, 75 Cal. Dec. 369.

INSTRUCTION No. 17.

You are instructed that before one can be convicted of a crime by reason of the acts of another person who acts in his behalf, a clear case must be shown. The civil doctrine that a person is bound by the acts of his agent within the scope of the agent's authority has no application to criminal law. If a person is liable at all criminally for the acts of another, such liability must be founded upon authorized acts. Authority to do a criminal act will not be presumed. [312]

You are instructed that the charges contained in the indictment are based upon alleged violations of Section 215 of the Criminal Code, without the element of conspiracy. You are, therefore, instructed that before you can find the defendant Robinson guilty of any of said charges you must find first that

the false pretenses alleged in the indictment were made directly by defendant Robinson, or that they were directly authorized or consented to by the defendant Robinson, and in the latter event a clear case must be shown.

People vs. Doble, 75 Cal. Dec. 369.

People vs. Green, 22 Cal. App. 45, 50.

The defendants, and each of them, regularly and duly excepted to the refusal of the Court to instruct the jury as requested with proposed instructions No. 16 and No. 17, as more fully appears as follows:

Mr. McMILLAN.—May it please your Honor, I have not any exception to the charge your Honor has given to the jury. There was one instruction which I requested on behalf of the defendant Robinson which the Court has refused to give. I desire to note an exception to your Honor's refusal to give that instruction.

The COURT.—Just a moment. You asked for one instruction, Instruction No. 19.

Mr. McMILLAN.—No, that the Court has given already. To identify the instruction, it is No. 17.

The COURT.—Do you mean one of those by the joint defendants?

Mr. McMILLAN.—Yes.

The COURT.—You wish to take exception to the refusal of the Court to give Instruction No. 17 as presented by the joint defendants?

Mr. McMILLAN.—Yes.

The COURT.—Let the record show that you take your exception. [313]

Mr. HARRIS.—I would like to amplify it to this extent, particularly to the failure of the Court to give the instruction with reference to the fact that a clear case must be shown where one is to be found guilty of a crime alleged to have been committed by another.

The COURT.—The same instruction to which Mr. McMillan took an exception?

Mr. HARRIS.—Yes.

To which ruling of the Court the defendants, and each of them, then and there duly and regularly excepted.

EXCEPTION No. 125.

That the Court erred in denying the motion of the defendants for a new trial, to which ruling of the Court the defendants then and there duly and regularly excepted.

EXCEPTION No. 126.

That the Court erred in denying the motions of the defendants in arrest of judgment to the denial of which motions the defendants then and there duly and regularly excepted.

WHEREFORE, for the many manifest errors committed by the Court, the defendants through their attorneys pray that said sentences the judgments of conviction be reversed; and for such other

and further relief as to the Court may seem meet and proper.

R. B. McMILLAN,
Attorney for Defendant Robinson.
JAMES B. O'CONNOR,
HAROLD C. FAULKNER,
H. H. HARRIS,
Attorneys for Defendant Randolph. [314]

[Endorsed]: Due service and receipt of a copy of the within assignment of errors is hereby admitted this 29th day of June, 1928.

GEO. J. HATFIELD,
Per J. L. SWEENEY,
Attorneys for United States.

Filed Jun. 29, 1928. [315]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL, SUPERSEDEAS AND BONDS.

Upon motion of the attorneys of the above-named defendants Samuel H. Robinson and J. W. Randolph, and it satisfactorily appearing that said defendants have this day duly filed their, and each of their, notice of appeal to the United States Circuit Court of Appeals in and for the Ninth Circuit from the judgments, and each of said judgments, made and entered in the above-entitled cause against them, and each of them, on June 20, 1928, and said defendants, and each of them, have filed their peti-

tion for an appeal, together with their assignment of errors and proposed bill of exceptions,—

IT IS ORDERED, that an appeal be, and the same is hereby allowed to have reviewed in said United States Circuit Court of Appeals in and for the Ninth Circuit the judgments and sentences heretofore entered in the above-entitled action against said defendants Samuel H. Robinson and J. W. Randolph, [316] and each of them, and that the Clerk of this Court transmit to the Clerk of the United States Circuit Court of Appeals in and for the Ninth Circuit, a full, true and correct transcript of all records and proceedings in the above-entitled cause.

AND IT IS ORDERED, that the amount of the cost bond on said appeal herein be and hereby is fixed in the sum of Two Hundred and Fifty Dollars ($250), conditioned as required by law and rules of this Court.

AND IT IS ORDERED, that upon the giving by said defendant Samuel H. Robinson of a good and sufficient bond or undertaking in the sum of $10,000.00 and conditioned as required by law and the rules of this court, all further proceedings in this court be suspended and stayed as against said defendant Samuel H. Robinson until the final determination of said appeal by the said United States Circuit Court of Appeals, or by the Supreme Court of the United States upon a petition for writ of certiorari.

AND IT IS ORDERED, that upon the giving by said defendant J. W. Randolph of a good and

sufficient bond or undertaking in the sum of $10,000.00 and conditioned as required by law and the rules of this court, all further proceedings in this court be suspended and stayed as against said defendant J. W. Randolph until the final determination of said appeal by the said United States Circuit Court of Appeals, or by the Supreme Court of the United States upon a petition for writ of certiorari.

AND IT IS FURTHER ORDERED, that the assignment of errors and proposed bill of exceptions filed herein and presented herewith jointly and severally on behalf of said defendants Samuel H. Robinson and J. W. Randolph be and the same is made [317] the assignment of errors and proposed bill of exceptions on behalf of said defendants, and each of them.

Dated, June 29, 1928.

HAROLD LOUDERBACK,
U. S. District Judge.

Due service of the within order and receipt of a copy thereof hereby admitted this 29 day of June 1928.

GEO. J. HATFIELD,
J. L. SWEENEY,
Attorneys for U. S.

[Endorsed]: Filed Jun. 29, 1928. [318]

[Title of Court and Cause.]

BILL OF EXCEPTIONS ON BEHALF OF THE ABOVE-NAMED DEFENDANTS SAMUEL H. ROBINSON AND J. W. RANDOLPH, STIPULATION BETWEEN PARTIES THAT SAME BE SETTLED AND ALLOWED AS THE TRUE BILL OF EXCEPTIONS HEREIN, AND ORDER OF COURT SETTLING AND ALLOWING.

BE IT REMEMBERED, that heretofore, to wit, on February 21, 1928, the Grand Jury of the United States, in and for the Northern District of California, Southern Division, First Division, did present and return into and before the above-entitled Court its indictment against the above-named defendants; that on said day said indictment was filed in said court, and thereafter each of said defendants was duly arraigned, as shown by the record on file in the above-entitled cause.

AND BE IT FURTHER REMEMBERED, that thereafter, to wit, on March 26, 1928, the above-named defendants, Samuel H. Robinson and J. W. Randolph, each duly filed his demurrer to said indictment, as shown by the records of said court, and made a part hereof. [319]

EXCEPTION No. 1.

That on March 29, 1928, said Court sustained each of said demurrers as to Count One of said indictment, and overruled each of said demurrers as to all remaining counts.

That said demurrers, after stating the title of the court cause, were and are as follows:

I.

That said indictment does not, nor any count thereof, state facts sufficient to constitute a public offense against the United States of America.

II.

That the indictment and each and every count thereof fails to advise the defendant herein sufficiently of the charge or charges that he is called upon to meet and does not contain averments sufficient to enable him to intelligently prepare for his trial and that in said behalf, each count thereof is ambiguous, unintelligible and insufficient in the following particulars:

1. That the paragraph beginning at line 12 and page 1 of said indictment herein, is unintelligible, ambiguous and meaningless and that the meaning intended to be conveyed thereby cannot be ascertained therefrom.

2. That with reference to the paragraph beginning on line 29 and page 1 of said indictment, it cannot be ascertained therefrom what part or connection, if any, the defendant, J. W. Randolph, had with said scheme or in what way he devised or intended by means of the allegations thereof to take part in said scheme to defraud.

3. That with further reference to said last mentioned paragraph in said indictment, it cannot be ascertained [320] therefrom whether the acts specified therein were actually performed.

4. That the paragraph beginning with line 21 of page 2 of said indictment is uncertain and ambiguous in that it cannot be ascertained therefrom, —(a) What relation, if any Cromwell & Company, Inc., had to the alleged scheme or device. (b) Whether the said Samuel H. Robinson did in fact mail said Articles of Incorporation to LeRoy F. Pike at Reno, Nevada. (c) Whether said Robinson did request said Pike to obtain dummy directors. (d) In what manner said acts were unlawful or in violation of the Statutes of the United States or any state or territory thereof. (*c*) What relation, if any, the said acts had to said alleged scheme or artifice to defraud.

5. With relation to paragraphs beginning on line 3 and ending on line 12 of page 3 of said indictment, it does not appear and cannot be ascertained therefrom,—(a) Whether it was part of the scheme or artifice to defraud that defendant, Kassmir, should offer to subscribe or should pay the sum of Fifty Thousand ($50,000.00) Dollars cash for said stock, or whether he should pay the said Fifty Thousand ($50,000.00) Dollars. (b) That the falsifying or negativing paragraph thereof does not allege that the said Kassmir did not offer to subscribe. (c) That said negativing paragraph states, "as defendant then and there well knew," but does not state which defendant then and there well knew that Kassmir did not pay Fifty Thousand ($50,000.00) Dollars each. (d) That it cannot be ascertained therefrom who seconded, offered and/or passed said resolution, that is to say whether

it was Cromwell Simon and Company, Cromwell and Company or some other board, body or organization, or what relation said resolution had to said scheme or artifice. (e) That generally it cannot be ascertained in what manner said [321] acts were a part of or in furtherance of said scheme or artifice to defraud.

6. With relation to paragraph beginning on line 13 and ending on line 27 of page 3 of said indictment, it cannot be ascertained therefrom, nor from any part of said indictment,—(a) What is meant or intended to be meant by "Cromwell Simon and Co. Investment Plan,"—(b) What false and fraudulent representations or promises were made or intended to be made.

That the statements made therein are recitals of conclusions of law only and not allegations of fact.

7. With relation to paragraph beginning on line 5 of page 4, it cannot be ascertained therefrom nor from any part of said indictment, what false representations were to be used to induce and/or persuade the victims to purchase high-grade stock under the alleged Cromwell & Simon Co. Investment Plan,—(a) What the Cromwell & Simon Co. Investment Plan was.

8. With relation to paragraph beginning on line 14 and ending on line 22 of page 4 of said indictment, it cannot be ascertained therefrom nor from any part of said indictment,—(a) What time is referred to by the words "existing conditions," (b) What is meant by the language, "alluring, exaggerated, misleading, false and fraudulent rep-

resentations," that is to say what the alluring, exaggerated, misleading, false and fraudulent representations related to. (c) What the language, "should raise in said victims hopes and expectations of profit and reward far beyond the limits warranted by existing conditions" relates to, or what connections same had, if any, with said artifice or scheme to defraud.

9. With relation to paragraphs beginning with line 24 and ending with line 31 of page 4, it cannot be ascertained therefrom nor from any part of the said indictment,—(a) In what [322] respect it is alleged that Cromwell Simon & Co. was a reputable company, that is to say, reputed for what. (b) That the negativing and falsifying clause does not deny or allege that Cromwell Simon & Co was a reputable brokerage company. (c) That it cannot be ascertained what is meant by "of the character of a bucket shop." (d) That the allegations in said paragraph as to representations were only representations of opinion and "puffing" permitted by law.

10. With reference to the paragraph beginning on line 1 and ending on line 7 of page 5 of said indictment, it cannot be ascertained whether in truth or in fact it was or was not the business of Cromwell Simon & Co. to sell to alleged victims high grade corporation stocks and other securities, particularly on the partial payment plan.

11. With relation to paragraph 3 on page 5 of said indictment, it cannot be ascertained therefrom nor from any part of said indictment what is meant

by,—(a) Cromwell Simon & Co. Investment Plan.

12. With relation to paragraph 4 on page 5 of said indictment, it cannot be ascertained therefrom nor from any part of said indictment when or in what manner the alleged victims would draw any dividends or interest declared on high-grade stock or other securities so purchased and held by them, that is to say, said victims, or in what manner, if at all this defendant would or could become possessed of said dividends or interest, or any of said defendants or in what manner said Cromwell Simon & Co. could or would become possessed of said dividends or interest thereon.

13. With relation to paragraph 5 appearing on page 6 of said indictment, it cannot be ascertained therefrom nor from any part of said indictment what relation the following words, to wit: [323] "that an investor subscribing for such corporate stock, or other security, through the said company, would have the privilege of selling the same at any time he desired," would have as to the alleged scheme or artifice to defraud in this that it is not negatived or falsified that said investors referred to in said indictment had such privilege.

14. That Count 1 of said indictment does not state facts sufficient to constitute an offense against the United States of America; that said count does not allege that the letter set forth in said count was ever placed or cause to be placed in the United States mail.

15. That with respect to the letters referred to in each and all of the counts of said indictment,

only the following are purported to be signed by or referred to the said defendant, J. W. Randolph: The letter referred to in Count Three and marked Exhibit "F," the letter referred to in Count Eleven and marked Exhibit "P," the letter referred to in Count Nineteen and marked Exhibit "EE," the letter referred to in Count Twenty-two and marked Exhibit "HH," the letter referred to in Count twenty-three and marked Exhibit "II," the letter referred to in Count twenty-four and marked Exhibit "KK," the letter referred to in Count Twenty-five and marked Exhibit "LL," the letter referred to in Count Twenty-seven and marked Exhibit "MM" and the letter referred to in Count Thirty and marked Exhibit "PP," and it does not appear in the said indictment or any of the counts thereof what connection, if any, said J. W. Randolph had with the mailing of each and all of the exhibits referred to in this indictment and all of the various counts thereof.

EXCEPTION No. 2.

AND BE IT FURTHER REMEMBERED, that said defendants, Samuel H. Robinson and J. W. Randolph each duly and seasonably [324] filed demands for bill of particulars, as shown by the records of said court, made a part hereof, a copy thereof being as follows:

Now come J. W. Randolph and Samuel H. Robinson, by their attorney, H. H. Harris, and move the above-entitled court for an order directing the United States District Attorney for the Northern

District of California, Southern Division, to furnish to said defendants a bill of particulars in order that said defendants may know and be particularly informed of the following matters, to wit:

(1) The names of the persons referred to in said indictment as victims.

(2) What particular certain class of persons the defendants had devised a scheme and artifice to defraud?

(3) When or during what period prior to the mailing of the letters stated did defendants devise or intend to devise the scheme to defraud alleged in the indictment?

(4) The names and addresses of the persons to whom and the times and places when the defendants Cromwell Simon and Harry M. Kassmir as copartners or otherwise offered for sale or negotiated for the sale of or otherwise dealt in securities in the State of California.

(5) Whether or not the defendant, Robinson, ever requested said Pike to obtain dummy directors and regularly incorporate Cromwell & Company, Inc., under the laws of the State of Nevada and if so when the said Pike did said things, and the names and addresses of said dummy directors.

(6) Whether or not Samuel H. Robinson, Harry M. Kassmir and Cromwell Simon ever visited Reno, Nevada, for the purpose of obtaining a meeting of the directors of Cromwell & Company, Inc., and if so the time when said visits occurred and the time when said meeting of said directors occurred.

(6a) What relation, if any, the formation and/

or existence [325] of Cromwell & Company, Inc., had or could have had to the alleged scheme or device.

(7) Whether or not the defendant, Kassmir, ever offered to subscribe $50,000.00 of said company's stock and pay cash for it and if so the time and place when said offer was made.

(8) Who put the offer of Harry M. Kassmir to subscribe $50,000.00 worth of stock in the form of a resolution and who seconded said resolution and who were the persons who voted and passed the same unanimously.

(9) Whether or not the offer of Harry Kassmir to subscribe $50,000.00 worth of said company's stock was ever accepted by said company and if so the time and place when said acceptance occurred.

(10) What were the terms and conditions of the so-called Simon & Company investment plan.

(11) Whether or not the defendants J. W. Randolph or Samuel H. Robinson ever solicited or procured from the so-called victims subscriptions or orders for shares of corporate stock or other securities and if so the names and addresses of said alleged victims and the time and place of said soliciting or procuring said subscriptions.

(12) What false or fraudulent representations or promises as to the financial standing of the Cromwell Simon & Company or of the defendant, Cromwell Simon, or Harry M. Kassmir were ever made by the defendants J. W. Randolph or Samuel H. Robinson.

(13) To what persons and at what time or place

were any false or fraudulent representations or promises as to the financial standing of the Cromwell Simon & Company and of the defendants Cromwell Simon or Harry M. Kassmir were ever made by the defendants J. W. Randolph or Samuel H. Robinson.

(14) What false or fraudulent representations or promises [326] as to the care or watchfulness exercised for the benefit of said alleged victims by the said defendants over investments made with them were ever made by any of the defendants, particularly the defendants J. W. Randolph and Samuel H. Robinson.

(15) The time and place of making, the names of the defendants who made and the names of the persons to whom the defendants, J. W. Randolph or Samuel H. Robinson, made any false or fraudulent representations or promises as in the last paragraph above set forth.

(16) What false or fraudulent representations or promises as to the alleged safety of purchasing stocks or other securities through the defendants and the said Cromwell Simon Company were ever made by the defendants, J. W. Randolph or Samuel H. Robinson.

(17) The time of making and the persons to whom the defendants, J. W. Randolph or Samuel H. Robinson, made any false or fraudulent representations or promises as in the last next preceding paragraph set forth.

(18) Whether or not either of said defendants, J. W. Randolph or Samuel H. Robinson, required

any alleged victims to deliver over to defendants valuable securities as alleged collateral to secure deferred payments on stock subscribed for and if so the names of said victims, together with a description of any securities delivered to defendants by them and the time and place of said delivery.

(19) Whether or not said defendants J. W. Randolph or Samuel H. Robinson ever took or embezzled or converted any collateral securities to their own use or benefit and if so a description of said securities, the names of the persons from whom taken or procured, the names of the defendants who so took said securities, the names of the defendants who embezzled or converted said securities, together with the time and place of such taking, [327] embezzlement and conversion.

(20) What were the false representations which the defendants or any of them did not then or there or ever intend to carry out or perform, particularly with reference to the defendants J. W. Randolph or Samuel H. Robinson.

(21) To whom were the false representations referred to in the last next preceding paragraph made or communicated by means of letters or circulars or advertisements and what were the contents of said letters, circulars and advertisements.

(22) The names of the persons to whom false representations which the defendants did not then or there or ever intend to carry out or perform were made and the time and place of said making, together with the names of the defendants making

them or the names of agents who made them on behalf of said defendants.

(23) Whether or not the defendants J. W. Randolph or Samuel H. Robinson or either of them ever made any of the alleged alluring, exaggerated, misleading, false or fraudulent representations, pretenses or promises as set forth in sub-paragraphs 1, 2, 3, 4 and 5 of each and every count of said indictment and if so made, the names of the defendants making them, the names of the persons to whom made, the places where made and the time of the making thereof.

(24) What were or are sufficient financial resources necessary to carry on a reliable brokerage business?

(25) What was or is the financial resources of any of the defendants named in said indictment or of Cromwell Simon & Company?

(26) What is a responsible brokerage house and what is necessary to constitute the same?

(27) Whether or not the alleged representation that persons could rely upon the standing or financial standing or [328] Cromwell Simon & Company was or was not true.

(28) Whether or not the representations that the business of Cromwell Simon & Company was to sell to the alleged victims high-grade corporate stock and other securities on the partial payment plan or otherwise was or was not true.

(29) Whether or not the defendants or any of them or Cromwell Simon & Company, and particularly the defendants J. W. Randolph and Samuel

H. Robinson received any orders from any person or persons for the purchase from them of any corporate stock or securities and if so the names of the persons placing said orders or offers together with the time and place thereof and a description of the stock or securities embraced in said orders.

(30) Whether or not the alleged false representation that the defendants would obtain subscriptions from the alleged victims for stocks and other securities on the Cromwell Simon & Company investment plan and would immediately purchase the same at a market price for and on account of the said alleged victim and that Cromwell Simon & Company would hold the same so that the alleged victims could be certain that the stocks and other securities would be on hand for them when called for by them was or was not true.

(31) Whether or not Cromwell Simon & Company ever received any orders which required them to immediately purchase stock or other securities at the market price or otherwise for the account of said alleged victims and if so the persons who placed said orders, the time and place thereof and the contents of said orders.

(32) Whether or not any dividends or interest were ever declared or payable on any high-grade stock or other securities purchased and held by defendants or Cromwell Simon & Company for any persons at all and if so when said dividends were declared or [329] said interest was payable and on what stocks or securities and to what persons

the defendants or Cromwell Simon & Company should have paid the same.

(33) What were or are the qualifications necessary on the part of Cromwell Simon & Company to qualify it to advise victims to buy or sell corporate stocks or other securities and in what portion of such qualification was said company deficient?

(34) What are the facts which resulted in said victims not being able to *realize* upon the defendants or any of them for safe or other information or advice in the matter of buying or selling stocks or securities?

(35) What amounts of money or property did defendants J. W. Randolph or Samuel H. Robinson ever appropriate or embezzle to their own use or benefit?

(36) From whom did defendants J. W. Randolph or Samuel H. Robinson ever procure any money or property which they appropriated or embezzled to their own use and benefit.

(37) The times and places where the defendants J. W. Randolph or Samuel H. Robinson or either of them ever appropriated or embezzled to their own use or benefit any money or property.

(38) How or in what manner Exhibits "A" to "BBB" either individually or collectively could have been or were in furtherance of any alleged scheme or artifice to defraud, particularly with relation to the defendants J. W. Randolph or Samuel H. Robinson.

(39) How or in what manner any letters written by or pertaining to the business of the Charles

Wesley Company of Los Angeles, California, have been or were in furtherance of any scheme to defraud set forth in any of the counts of said indictment, and particularly the letters alleged to be mailed or caused to be mailed by the defendants J. W. Randolph or Samuel H. Robinson or either or them. [330]

(40) How or in what manner any letters written by or pertaining to the business of Thomas Allen Company of Seattle, Washington, could have been or were in furtherance of any scheme or artifice to defraud set forth in said indictment?

(41) That said aforementioned matter relates to general allegations contained in the indictment on file herein and that more particular and specific knowledge of such matters is necessary to said defendants on their trial and that without such particular knowledge said defendants will be unable to properly prepare their defense to said indictment or to prepare any defense at all.

This motion is made upon the indictment on file herein, upon the matters set forth in this motion and on the affidavits of defendants J. W. Randolph and Samuel H. Robinson filed herewith and attached hereto.

Respectfully submitted,

H. H. HARRIS,

Attorney for Defendants J. W. Randolph and Samuel H. Robinson.

[Title of Court and Cause.]

AFFIDAVITS OF J. W. RANDOLPH AND SAMUEL H. ROBINSON.

State of California,
County of Los Angeles,—ss.

J. W. Randolph and Samuel H. Robinson, being first duly sworn, each for himself, deposes and says

That he is one of the defendants in the above-entitled action; that the trial of the above-entitled action has been set for the 29th day of May, 1928; that he is in possession of a copy of the indictment on file in the above-entitled action and that he has read the same; that said indictment purports to charge him with thirty-seven violations of section 215 of the Criminal [331] Code of the United States; that said indictment contains and is almost entirely composed of allegations of acts alleged to have been committed by the defendants; that these acts are alleged in general terms and the indictment fails to allege the time, place or circumstances necessary to identification of any of the acts so alleged or necessary fully to advise affiant of the particular circumstances of said act; that he has been informed by his attorney, H. H. Harris, and upon such information believes and alleges that unless he is furnished with a bill of particulars which bill of particulars shall particularly and specifically inform him of the exact time when said acts were committed, *what* particular place where said acts were committed and of the particular

circumstances surrounding and comprising the commission of these acts, that he will be unable to properly prepare his defense to said indictment or to prepare any defense at all.

(Duly signed and sworn to before notary public.)

Said demands for bill of particulars came on regularly to be heard, were heard, and were ordered denied by the Court, to which order denying said demands for bill of particulars said defendants each duly entered his exception.

EXCEPTION No. 3.

AND BE IT FURTHER REMEMBERED, that the above-named defendant, Samuel H. Robinson duly and seasonably and before the trial of the above-entitled cause, filed his petition for severance, as shown by the records of said court, made a part hereof.

That a copy of said petition, together with the affidavit of said Robinson in support thereof, is as follows:

[Title of Court and Cause.]

Now comes the defendant, Samuel H. Robinson, by his attorney, H. H. Harris, and respectfully prays the above-entitled court that he be tried separate and apart from the other defendants [332] and that there be a severance as between him, as a defendant, and the other defendants, in the said entitled court and for ground of severance alleges as follows:

I.

That there is certain evidence necessary and material in his defense, which as to certain of the other defendants, particularly Harry M. Kassmir and Cromwell Simon, would be inadmissible by reason of their privileged nature.

II.

That there is certain evidence material and necessary in his defense that would be inadmissible against any of the other defendants, particularly Harry M. Kassmir and Cromwell Simon, by reason of the fact that the introduction of those said facts on his behalf would be inadmissible over the objection of the other defendants on the ground that they would thereby be compelled to testify against themselves without their consent.

III.

That the defense of Samuel H. Robinson is antagonistic to the defense of the other defendants in said cause.

IV.

That the defense of Samuel H. Robinson would implicate certain of the other defendants, particularly Harry M. Kassmir and Cromwell Simon.

V.

That the defense of Samuel H. Robinson cannot be presented fairly and properly in a joint trial with the other defendants and that the introduction of certain evidence pertaining to other defendants

that would be as to him incompetent and immaterial, would seriously prejudice him.

H. H. HARRIS,
Attorney for Petitioner. [333]

[Title of Court and Cause.]

State of California,
County of Los Angeles,—ss.

Samuel H. Robinson, being first duly sworn, deposes and says:

That he is one of the defendants in the above-entitled action. That the date of the trial of the above-entitled cause has been set for May 29, 1928. That there are four other defendants; that unless this Court grants the petition of this affiant to have his trial severed from the trial of the other four defendants, he will be tried on said date, jointly with the other four defendants.

Your affiant is an attorney at law, duly licensed and admitted to practice in all of the courts of the State of California, and has been such for more than seven years last past. That he is charged jointly with four other defendants in thirty-eight counts in this indictment of having used the mails to defraud. Affiant states that his only relation with the other defendants was that of attorney and client; that of the thirty-eight letters upon which the thirty-eight counts of the indictment are predicated, only five have been mailed or caused to be mailed by him. That these letters were sent out by him in the regular course of business and as part

of his professional employment as attorney for certain of the other defendants; that he never had any acquaintance with the other defendants, nor had any part in the scheme set out in the indictment, prior to June, 1925; that said indictment contains various letters alleged to have been sent out prior to that date. That for the purpose of his defense, it will be necessary for him to introduce a number of letters and documents passing between the defendants, Harry M. Kassmir, Cromwell Simon and your affiant. That in addition to these letters, [334] there were numerous oral communications and that said letters, documents and oral communications were occasioned solely by the relations between the said defendants, Harry M. Kassmir, Cromwell Simon and your affiant, by reason of the relation of attorney and clients; that these communications are therefore privileged and therefore inadmissible and that an objection to their introduction will be made by at least one of the defendants jointly charged with affiant. That these letters, documents and communications are absolutely necessary in the defense of your affiant; that his inability to introduce them would result as to him in a serious miscarriage of justice and a prejudice of his rights.

That in order to introduce evidence necessary in his own defense, affiant expects and intends to take the stand on his own behalf and his evidence will implicate certain of the other defendants and his defense is antagonistic to them.

WHEREFORE, your affiant prays an order of this Court severing his trial from the trial of the other defendants.

(Duly signed and sworn to by Samuel H. Robinson.)

That said petition for severance came on regularly to be heard, was heard, and was denied by the Court and said defendant Samuel H. Robinson duly noted an exception to the order of the Court denying his said petition for severance.

AND BE IT FURTHER REMEMBERED, that said defendants pleaded Not Guilty to said indictment on March 26, 1928, and the cause being at issue, the same came on regularly for trial before the Honorable Harold Louderback, United States District Judge, on May 29, 1928, and a jury was duly impaneled and sworn to try the cause, the United States being represented by George J. Hatfield, Esq., United States Attorney, Joseph L. Sweeney, Esq., Assistant United States Attorney, and William A. O'Brien, Esq., Assistant [335] United States Attorney, and the defendants hereinafter named, being personally present and represented by counsel as follows:

For defendant, Harry M. Kassmir, Fred McDonald, Esq.;

For defendant, Samuel H. Robinson, R. B. McMillan, Esq.;

For defendant, J. W. Randolph, H. H. Harris, Esq.; and

For defendant, Ortin E. Goodwin, John A. McGee, Esq.

Defendant Cromwell Simon not appearing, his bond was ordered forfeited.

After said jury was duly impaneled and sworn as aforesaid, an adjournment was thereupon duly taken until May 31, 1928, at 10:00 A. M.

Thursday, May 31, 1928.

Thereupon, Joseph L. Sweeney, Esq., Assistant United States Attorney, made an opening statement to the jury as to the matter the plaintiff expected to prove.

Thereafter the following proceedings were had:

Mr. McDONALD.—At this time, if your Honor please, in the interest of time of both your Honor and the jury, I would ask that any objection made by one defendant be considered as made by all the defendants, and an exception reserved by one defendant be considered as reserved by all of the defendants.

The COURT.—Except in those cases where objections are made on behalf of one defendant may not apply to the others, in which case you will have to specifically state the objection on behalf of that defendant. Where the objection would apply to all the defendants, I am willing to have that apply.

Thereupon the United States, to maintain the issues on its part to be maintained, called as its first witness, Mrs. Emily A. Beans.

TESTIMONY OF MRS. EMILY A. BEANS, FOR THE UNITED STATES.

Mrs. EMILY A. BEANS, produced as a witness on behalf of the United States, having been first duly sworn, testified in substance as follows: [336]

Direct Examination.

(By Mr. SWEENEY.)

I reside in Oakland, 608 Excelsior Boulevard, and during the year 1925 resided at 5838 Birch Court, which was my own house. I know the defendants J. W. Randolph, Harry Kassmir and Samuel H. Robinson. (Witness here identifies said three defendants in the courtroom.) I doubt if I would recognize Ortin E. Goodwin; I never met him, I think, but once. The defendant, Cromwell Simon, who is not here, I know; I met him two times. Met Mr. Randolph some time during the early part of the year 1925; yes, in March; he came to my house, I am not sure whether it was by appointment, or not, but he came to my house, and we talked along socially for a little bit, and then he finally broached the subject; he said that he would like to help me to make back some of the money that he had caused me to lose in the Nabisco Company, and he said, "Haven't you got some stock laying around here that is not paying any money only dividends," and I said, "Why, yes, I have got some stock, but I don't know whether I want to let it go or not," and he explained to me how he could take those

(Testimony of Mrs. Emily A. Beans.)

stocks and put them in Cromwell Simon and have them pay me good money; let them lay in Cromwell Simon's vault as collateral, and then they would buy me some stock, whatever I wanted, Hudson, or Studebaker, whatever I might see fit, and be earning a little money for me; prior to this visit, I had some business dealing with Mr. Randolph—I bought Georgia Fruit Company, and lost considerable money on that transaction.

"Mr. McGEE.—Of course, it is understood that that testimony is limited to the defendant Randolph, that it is hearsay as to the other defendants.

The COURT.—Unless it is connected up with the particular scheme alleged, of course it would have no bearing except on the identification of Randolph."

EXCEPTION No. 4.

Mr. McMILLAN.—May it be understood that I object to that testimony upon the ground that so far as the defendant Robinson is concerned it is too remote, incompetent, and hearsay. [337]

The COURT.—Will you connect this up with this matter?

Mr. SWEENEY.—It is just a matter of identification of Mr. Randolph, and showing the entrée that Mr. Randolph had to this lady.

Mr. SWEENEY.—I will offer to connect it up, if I do not connect it up it will be ruled out.

The COURT.—Connect it up as a part of the case, or simply as identification?

(Testimony of Mrs. Emily A. Beans.)

Mr. SWEENEY.—I will have to stand on my former statement, just as a matter of identification.

The COURT.—It will be received for that purpose, and only for that limited purpose, and the objection will be overruled.

Mr. McMILLAN.—May we respectfully note an exception?

The COURT.—Yes.

WITNESS.—(Continuing.) During Mr. Randolph's first visit in March, 1925, I did not give him any stock; my stocks were at Berkeley in the safe deposit vault, but I agreed to get them out and he was to come over again and see the stock. I got the stock home, and Mr. Randolph came up by appointment; he came alone. This second visit was along in the latter part of March, 1925; I cannot fix the date, I have tried to forget the whole transaction. Only myself and Mr. Randolph present.

EXCEPTION No. 5.

Q. What was the conversation you had with Mr. Randolph at that time?

Mr. McMILLAN.—So far as the defendant Robinson is concerned, that is objected to on the ground it is hearsay, and is *res inter alios acta*.

Mr. SWEENEY.—It is all part of one scheme.

The COURT.—The objection will be overruled.

Mr. McMILLAN.—Note an exception. [338]

Well, he told me, he said that he could take that stock of mine, turn it into Cromwell Simon, and

(Testimony of Mrs. Emily A. Beans.)

they would hold it as collateral and buy me some Studebaker with it, and I said then it means that my stock will simply repose in Cromwell Simon's safe deposit vault, instead of mine, and he said, "Absolutely, yes," that was his exact words, "Absolutely yes." I did deliver the stock to Mr. Randolph and he gave me a receipt for it. I could not tell you the number of shares of stock I delivered to him, but I know the number of dollars that it amounted to was $3,100.00. $3,100 was the face value of it. (Here witness is shown a receipt for the stock and counsel for defendant Randolph stipulated that said receipt was given to the witness and was signed by Randolph.) He kept a copy of it. The receipt now shown me is in my name, and that is his name and the shares of stock. (Said receipt is here marked, Government's Exhibit No. 1 for Identification.)

When Mr. Randolph called on me the second time I do not remember signing any kind of a contract with him or any character of paper to act as agent. Mr. Randolph came to *see again* just a few days later. I just can't recall what called him over but he had not been in the house but a little while when my telephone rang and I went to the telephone. A. W. Scott was on the telephone. After that telephone conversation, I had a conversation with Mr. Randolph concerning the subject matter of the telephone call. The situation is this: I was informed by Mr. Scott about certain things and I told those things to Mr. Randolph. His only answer was,

(Testimony of Mrs. Emily A. Beans.)

"They all do it," and I immediately put on my things and went over to Mr. Scott. I went over by myself.

Mr. HARRIS.—If your Honor please, so that I won't interrupt the witness, on behalf of the defendant Randolph I reserve any objections and motions to strike out.

The COURT.—I do not want to put it that way, because [339] you may be reserving objections that are not brought to the attention of the Court. If the same objection is made as before, I can make the same ruling and go ahead on the understanding, but simply to give you that blanket reservation without the Court knowing what the objection may be, I am not prepared to make any such ruling as that.

Mr. McMILLAN.—May I at this time note clearly what my objection is to this testimony?

The COURT.—I will say—I am not going to go back over the record as to what was understood. I said you must object each time. If a new question comes up and you wish to put in the record something that you feel that you have not already in the record, it will have to be put in the record, and will apply to the questions that are being propounded. I am not going to go back over the record.

Mr. McMILLAN.—My guidance, your Honor, was the rule that we entered into at the start, that one objection made by counsel, the other counsel

(Testimony of Mrs. Emily A. Beans.)

would have the benefit of that if it applied—is that still understood?

The COURT.—It will apply equally to all defendants, but if one defendant has a defense against another, which I do not know that he will have, but if he does have a defense as distinguished from another, then you have got to object for that defendant. In other words, suppose the question is not proper as against any defendant, and an objection made, that is good for every defendant. But suppose that the evidence would be good against one or two of the defendants, and not against the others, then the objection is only good for the person who makes the objection. That is the situation.

Mr. McMILLAN.—May I reserve a motion to strike out this testimony seasonably? [340]

The COURT.—I think as far as the motion to strike out is concerned, you may present that to the Court.

Mr. HARRIS.—That would inure to the benefit of all the defendants.

The COURT.—Yes, I can see no objection to that. If it is not connected up in the record, but stands unsupported, it will be stricken out, of course. Let us proceed.

The first time I saw Mr. Kassmir was the day I went over to see Mr. Scott, went from Mr. Scott's office there; they were waiting, just waiting to have the signatures put on, the names, and I did not know what to do, so I promised that I would go

(Testimony of Mrs. Emily A. Beans.)

to the Mills Building before I would do anything; so I went over to see Mr. Kassmir and he talked very nice to me, and persuaded me to leave that stand, that I would get my stock back, he would give me a receipt, I would get my stock back and still have it there earning money for me. When I went to the Mills Building. I went to Mr. Kassmir's private office, of the firm of Cromwell Simon Company and Cromwell Simon sat in the room for a while and I was introduced to Mr. Cromwell Simon at that time.

EXCEPTION No. 6.

Q. Now, can you tell us more definitely the conversation you had with Mr. Kassmir on that occasion?

Mr. HARRIS.—That is objected to on the ground there is no foundation laid yet; I only want all of the parties present.

Mr. SWEENEY.—Who was present at that time?

A. Just Cromwell Simon, and I do not think he was in the room all the while.

Q. Who else? A. Mr. Kassmir.

Mr. McMILLAN.—I ask leave at this time, so that my objection will appear clearly in the record —I make an objection [341] on behalf of the defendant Samuel Robinson, first that this testimony is too remote so far as that defendant is concerned, that it is *res inter alios acta,* that it is hear-

say, and, furthermore, they are seeking to bring in declarations and actions at a time that is remote to the charges contained in this indictment; this is not a conspiracy charge, but a charge under Section 215 of the Criminal Code, the 38 counts being based under that section, and they are substantive offenses, not any charge of conspiracy, and none of these statements, none of these situations, none of these conversations that the witness has related, in so far as the defendant Robinson is concerned, are in any way, shape, or form binding upon him, and hearsay, and incompetent, and your Honor will note from the opening statement of the District Attorney that Mr. Robinson had not even met these persons at that time.

The COURT.—What have you to say to that?

Mr. SWEENEY.—Just this, that the Government is showing a scheme, and in the performance of that scheme admissions or statements made by one of the—I was going to say one of the conspirators—one of the persons, one of the defendants, binds the others, if it was for the purpose of furthering the scheme.

The COURT.—Your contention is the way of proving a scheme or artifice like this, that it is as proving a conspiracy?

Mr. SWEENEY.—Absolutely. If we can connect Mr. Robinson up with this scheme at any time, he is responsible for everything.

The COURT.—Is it your theory that statements made by those engaged in the common design can

be used against one another irrespective of whether there is a conspiracy or not.

Mr. SWEENEY.—If you will indulge me for a minute or so I will find it for you.

Mr. McMILLAN.—My further point is this, as far as my client is concerned, that he did not even know any of the parties [342] at that time.

The COURT.—That goes to different points.

Mr. McMILLAN.—It is in line with what may be connected up.

The COURT.—We have the whole record to find out whether it is connected up, or not. I think that point has been pretty well covered, that at the present moment there is not in the record statements which connect up the parties who are on trial.

Mr. McMILLAN.—Furthermore, it is too remote, and *res inter alios acta,* and hearsay.

Mr. SWEENEY.—May I quote the syllabus from U. S. vs. Belden found in 223 Fed. 726: (Reading.)

The COURT.—I will overrule the objection.

Mr. McMILLAN.—Note an exception. I move to strike out all of the testimony of the witness so far as my client is concerned, and ask that it be limited only to those defendants which he has named.

The COURT.—The ruling on that would have to be made much later, but at this time, the Court, under the stand taken by the Court, will overrule the objection. I can see the possibility of that being reviewed at a later time.

Mr. McMILLAN.—May I note an exception, and

(Testimony of Mrs. Emily A. Beans.)

have the privilege of renewing this motion?

The COURT.—The record will so show.

Mr. SWEENEY.—Q. Now, Mrs. Beans, would you tell us the conversation that you had with Mr. Kassmir in his office at the Mills Building when Mr. Cromwell Simon was present?

Mr. McDONALD.—Objected to on behalf of the defendant Kassmir, that it is immaterial, irrelevant, and incompetent, and not within the issues laid in the indictment.

The COURT.—Overruled. [343]

Mr. McDONALD.—Exception.

Mr. HARRIS.—We adopt the objection made by Mr. McDonald.

The COURT.—The same ruling.

Mr. HARRIS.—Exception.

A. Mr. Kassmir explained to me about the business, how, in buying the stock, it was the partial payment plan, and that it would make it easier for me, and they could earn money, and I would not have to put in very much money, and in three months probably I could sell them and make quite a bit, and I finally consented to let it go on, and it went on.

Mr. SWEENEY.—Q. Mrs. Beans, was anything said at that time with reference to the purchase of Studebaker stock?

A. Yes; they claimed they had already purchased it from me.

Only a few days after this Mr. Randolph and

(Testimony of Mrs. Emily A. Beans.)

Mr. Kassmir came to my home on Birch Court; I could not tell you the date, but it must have been in April, because, as I say, I have tried to forget those things. Mrs. Durham, my niece, was present at the conversation at this time. Possibly, Mrs. Durham had been present at previous conversations had with these people, but I don't remember that they had ever been over before together.

EXCEPTION No. 7.

Q. On that occasion, what was the substance of the conversation?

Mr. McGEE.—Objected to on behalf of the defendant Orton Goodwin, on the ground it is immaterial, irrelevant, and incompetent, and hearsay.

The COURT.—Overruled.

Mr. McGEE.—Exception.

Mr. McMILLAN.—That objection and exception is adopted by the defendant Robinson.

The COURT.—The same ruling. [344]

We borrowed $2,500.00 at the bank; we talked it all over together about the borrowing money; I know they encouraged us very much in doing it because they said that Studebaker was going up; whether they just said, "Go ahead and do it," or what, I don't know, or whether we said we would do it, we did it. We borrowed $2,500.00, and instructed them to buy Studebaker with it.

EXCEPTION No. 8.

Mr. SWEENEY.—Q. How did you borrow that $2,500?

(Testimony of Mrs. Emily A. Beans.)

Mr. McGEE.—Objected to as immaterial, irrelevant, and incompetent.

Mr. McMILLAN.—I adopt the objection.

The COURT.—Overruled.

Mr. McMILLAN.—Exception.

I had collateral and took it to the bank and they let us have the money. It was one hundred shares of the Pacific Lumber Company stock. The bank took it as collateral for the amount of $2,500.00. Mrs. Durham, my niece, went with me to the bank to get the money. I don't think we had yet consulted the bank when we came over to Cromwell Simon's rooms on some business, the nature of which business I do not recall. Then Mr. Kassmir and Mr. Randolph took their machine and brought us across the bay, and we supposed they were going to take us right to the bank; instead of that, taking us to the bank, they let us off a block from the bank, and they went on, and moved on somewhere while we were in the bank consulting the officials of the bank. That day we did not get any money from the bank, but we got the promise of it; a day or two afterwards, two or three days after, something like that, we got $2,500.00. We called up by phone and let Mr. Kassmir and Mr. Randolph know we had a check ready for them. I think it was Mr. Kassmir I talked with over the phone. That afternoon about two o'clock Mr. Randolph and Mr. Kassmir came over. I gave them the check for $2,500.00. At the time I gave them the $2,500.00 [345] check, I do not think I signed any contract. They

(Testimony of Mrs. Emily A. Beans.)

were going to buy Studebaker with it. In answer to your question, when was the next time you saw any of the defendants: Well, I do not think I could tell just how long it was before we saw them again, because—now, I am branching out a little bit to tell his, but this all comes to the story. Mr. Kassmir commenced to talk to my niece about bringing some of her funds over. This conversation was had in my presence. Just Mr. Kassmir and Mr. Randolph were present. This conversation between myself, Mr. Randolph, Mr. Kassmir and Mrs. Durham, my niece, took place, I will say in May, 1925, but I may be a little off.

EXCEPTION No. 9.

Mr. SWEENEY.—Q. What was the conversation, Mrs. Beans?

Mr. McMILLAN.—On behalf of the defendant Robinson I object to this testimony upon the ground that it is incompetent, that it is hearsay, that it is a transaction had between strangers, it is too remote, and it does not in any way, shape, or form show that Mr. Robinson was engaged in any joint enterprise or in any conspiracy, or in any manner, shape, or form aided, abetted, or assisted any of the defendants charged in the indictment, and that this testimony sought to be elicited, as well as all previous testimony elicited from this witness, is not within any count of the indictment before the the Court.

The COURT.—The objection is overruled.

(Testimony of Mrs. Emily A. Beans.)

Mr. McMILLAN.—Exception.

At the first meeting between myself, Miss Durham, Mr. Kassmir and Mr. Randolph, Mr. Kassmir tried to have her get money from the east, and I would not want to use the words that he used, because she was not willing to pull her money out back east and bring it out here and place it with them and buy stock. Mr. Randolph was present. He tried to argue the point with her, and told her what all he could do for her if she would bring her money here. He [346] said he would build it up very wonderfully, made good promises, I could not tell definitely just what promises he made, but he made good promises about what he could do for her. I know Miss Durham did bring some money from the east; but I don't think I could tell approximately how much. She turned the money over to Mr. Kassmir to buy stock, and he was trying to look up something, that he felt very sure would go up, and at the same time he said, as he was putting it, he was keeping it up his sleeve quite a while, but bye-and-bye he would be ready to purchase the stock. They got the money, but I couldn't say how much. [347]

The particular character of stock Mr. Randolph and Mr. Kassmir said they were going to buy for me and Miss Durham—in the first place we bought Studebaker, we got 250 shares of Studebaker.

EXCEPTION No. 10.

Mr. SWEENEY.—Q. To return, Mrs. Beans, to

(Testimony of Mrs. Emily A. Beans.)

the conversation you had with reference to the $2,500 incident, you recall that?

A. Yes.

Q. Can you remember any specific thing that Mr. Randolph said upon that occasion?

Mr. McGEE.—Objected to on the behalf of the defendant Goodwin on the ground it is immaterial, irrelevant, and incompetent, and not responding to any allegations in the indictment, and hearsay.

Mr. HARRIS.—We adopt the objection on behalf of the defendant Randolph.

Mr. McMILLAN.—We adopt that objection on behalf of the defendant Robinson.

The COURT.—Overruled.

Mr. McGEE.—Exception.

Mr. HARRIS.—Exception.

Mr. McMILLAN.—Exception.

A. When we borrowed that money, Mr. Kassmir, especially, I remember, promised us if we got into trouble, if we had to hold it in the bank longer than we expected to and got into trouble, and did not have money to meet things, they would stand back of us.

(The witness is here shown a letter, which she states she received through the mail, and had seen before, and that she recognized the signature. The letter was marked, [348] U. S. Exhibit 2 for identification.)

Along about the late spring of 1925, Mr. Kassmir and Mr. Randolph called frequently at our house. They talked about the bank well in the

(Testimony of Mrs. Emily A. Beans.)

summer, along in late summer, the date I cannot testify to, because I have tried to forget them, but along in late summer they told us about forming a bank over in Reno, and they wanted us to put our money in it, that it was going to be such a big thing. When I speak of "they" I mean Mr. Kassmir and Mr. Randolph. They reckoned it up and found out what we had, and they put the percentage that they thought we would make a year—Mr. Kassmir put it at 12 per cent, and Mr. Randolph spoke right up in these words, he said, "Harry, you better call it 8 until we get well started down at Los Angeles," so then Harry put it at 8, and said that the common dividend at the end of the year would probably be 25 per cent.

EXCEPTION No. 11.

Just prior to that time, did you have another conversation with Mr. Randolph and Mr. Kassmir with reference to your stock.

Mr. McMILLAN.—That is objected to on behalf of the defendant Robinson on all of the grounds heretofore stated, and for the same reasons.

The COURT.—Overruled.

Mr. McMILLAN.—Exception.

Mr. SWEENEY.—Q. You may answer.

A. There came a time when the stocks were sort of hanging low, and so they came to us and wanted us to give up our stock, that is, let them use the money—they did not have any stocks, never did have—and let them use the money, and they would give us—they could use it to good advantage in their

(Testimony of Mrs. Emily A. Beans.)

business, and they would give us $200 a month while they used it, and then when the stock [349] got good, then they would put it back in the stock. They took our money and they paid us $200 a month for two months, and that was when the bank sprung up. So I was very anxious to have a little more than what I had, and offered to put a mortgage on my home of $4,000.

EXCEPTION No. 12.

Mr. SWEENEY.—Q. Would you please tell us the conversation you had with Mr. Randolph and Mr. Kassmir relative to the mortgage on your house?

Mr. McGEE.—Objected to on behalf on the defendant Goodwin on all of the grounds heretofore stated.

Mr. McMILLAN.—The objections urged are adopted by the defendant Robinson.

The COURT.—I will overrule the objection.

Mr. McMILLAN.—Exception.

Mr. Kassmir said he would look after it for me, would take charge of it, and look after it, and he got it fixed up in Mr. Robinson's office, and we went there.

Mr. SWEENEY.—Q. Before you go there, will you tell us what conversation you had with these men when the subject of a $4,000 mortgage was broached?

A. They were very pleased over it; I cannot just tell the words that were used.

(Testimony of Mrs. Emily A. Beans.)

Q. When you say they were very pleased, who have you reference to?

A. Mr. Kassmir and Mr. Randolph. Where we saw one we saw the other.

I mortgaged my home at that time. The papers relative to that mortgage were drawn up in Mr. Robinson's office and I went there and signed it. He was present. It was all ready for me to sign; I believe he did it, but I don't know who did it, but they were all ready to sign. I actually got the $4,000 from a broker over in Oakland; and paid it over to Kassmir and Randolph. [350]

EXCEPTION No. 13.

Q. Up to this time, Mrs. Beans, how much money had you and Miss Durham given to Mr. Randolph or Mr. Kassmir, if you know, of your own knowledge?

Mr. McGEE.—I object to the question on behalf of the defendant Goodwin on all of the grounds stated in the previous objection.

Mr. McMILLAN.—I adopt the objection on behalf of the defendant Robinson.

Mr. HARRIS.—And on behalf of the defendant Randolph.

The COURT.—The objection is overruled.

Mr. McMILLAN.—Exception.

Mr. HARRIS.—Exception.

A. Between us, my niece, Miss Durham, and myself, we put in $12,056, into what they called their Reno bank.

(Testimony of Mrs. Emily A. Beans.)

Yes, I did get stock in that Reno bank, as I call it; but it was not made out right; we got a certificate, and it was not made out right, and then Mr. Kassmir took that back and sent it back and we got another, and that still, the names were not put in right, and then he took that the last time that we saw him—yes, the last time that we saw him he took that certificate and that was in—that must have been along in January or February, 1926—and said that he would send that back to Reno and have it fixed right, but we never got one in return. (Witness is here shown stock certificates, one No. 4 and one No. 5, capital stock, Preferred, of Cromwell & Co., Inc., Place of Business, Reno, Nevada, Office of Resident Agent, 315 Clay Peters Building, Reno, Nevada; and identifies same. The documents were marked U. S. Exhibit 3 for Identification.)

(Witness is here shown two more certificates and asked to identify same.) [351]

One of them I don't know anything about; this one is wrong and that one is wrong. I presume I saw them before; I sent them back. I do recognize one of them. This one positively, but that one has my name and number of shares, but I am not able to identify it. (One of said certificates, being certificate No. 55, is here marked U. S. Exhibit 4 for Identification.)

When we first got these certificates we put them in an envelope and sent them back and told Mr. Kassmir the names were wrong. Again he sent us another, and that was not right. Sent it back and

(Testimony of Mrs. Emily A. Beans.)

the last time we saw him we gave the last one to him, and he put it in his pocket and said, "I will attend to this," and it has never been attended to.

Referring again to the $2,500 note, it fell due the first of October, 1925. We owed $1,500 then and we appealed to Mr. Kassmir to furnish us with $1,500 for another three months, or till we could make a new loan to help us out, and he promised to do so, and so he finally sent us up $1,500 from Los Angeles, and at the same time said—now, Mr. Randolph did this, it was his letter that the check came in, the $1,500, and he said in that letter, "Send the collateral." I am familiar with Mr. Randolph's writing. It may have been addressed to Miss Durham as what was one was the other. We transacted our business together as one person. Yes, I received dividends from the Reno Bank, as I call it. We got dividends in October—we got $241 in October, $241 in January, $241 in April, and that ended it; it has been dead ever since. The first dividend I got from Los Angeles, Mr. Randolph sent it. The second dividend from Mr. Kassmir, from Seattle. The third dividend was received from Mr. Kassmir. In answer to your question whether I ever got any stock from the Cromwell Simon Company,—we were to have been furnished some bank stock but we did not have a thing in [352] our possession to show for it. No, never got any Studebaker stock. What they call their bank stock is that you have shown me. These certificates are the only thing that I have to show with

(Testimony of Mrs. Emily A. Beans.)

reference to our investment, and we have not got them, because we gave the last one to Mr. Kassmir to be fixed right, and he said he would do it, and it has never been done.

EXCEPTION No. 14.

Mr. SWEENEY.—That is all with this witness at this time, your Honor.

Mr. McGEE.—Before any questions are asked of the witness on cross-examination, I move on behalf of the defendant Goodwin that the entire testimony of this witness be stricken from the record on the grounds previously outlined to your Honor.

Mr. SWEENEY.—We expect to connect it up with Mr. Goodwin.

The COURT.—The objection will be overruled.

Mr. McGEE.—Exception.

Mr. McMILLAN.—May we have the benefit of that motion and your Honor's ruling?

The COURT.—The same ruling.

Mr. McMILLAN.—We respectfully note an exception, your Honor.

Cross-examination.

(By Mr. HARRIS, Attorney for Defendant Randolph.)

The first conversation was along about in March, 1925; that was when Mr. Randolph came over and talked to me about investing in some Studebaker stock. He told me that was the Studebaker Automobile Company that makes Studebaker cars and

(Testimony of Mrs. Emily A. Beans.)

that is what I understood I was investing in. Also he told me that it was his understanding that my stock would remain as collateral. I was surprised when I received that message from Mr. Scott on the telephone, and I went right to Mr. Scott's [353] office. All that Mr. Randolph said was, "They all do it." That is about all the comfort he could give me. He acted like he was upset, too. Then I went on down to Scott's place and there I met Mr. Simon and Mr. Kassmir. Afterwards I went up to the office of Cromwell Simon Company and saw Mr. Kassmir and Mr. Simon. I do not think Mr. Randolph was there in the room during that conversation. They claimed they had already bought the stock, and I just let it go; you see, it was a partial payment arrangement, and so I let it go. I think that if I had made a real fuss about it they would have given me my money back, maybe, and I could have gone and bought my stock again—I don't know whether they would, or not, but they made me such a good promise, that really and truly I thought they meant what they said; they won my confidence. The stock was already sold; my goodness, it was already sold, and had passed into the broker's hand. No, I never said that Mr. Randolph suggested that I should get a mortgage on my place. I guess we talked it over together, and I was willing to do it. I don't remember that Miss Durham used the expression in that conversation, "Now, Mr. Randolph is not saying anything, evidently he is against this proposition," and I said, "Well, we ought to know

(Testimony of Mrs. Emily A. Beans.)

what we want to do, and it is not so much Mr. Randolph's business, anyhow," or words to that effect. Miss Durham was there. We sat around in the parlor and chatted generally; we talked business pretty nearly all the time whenever they were in the house. I don't remember that Mr. Randolph talked much in that conversation. Right at first Mr. Randolph told me that he was only working for this company, in March, and later on, I could not tell when it was, when he came over to my house, he was introduced as general manager, as one party of the company. I don't *to* remember exactly the words he used. It went over a long period and a lot of transactions. [354] These specific lumber company's stock (the A. W. Scott stock) was more than $3,600 or $3,200; I do not remember just what the par value was. I paid $3,100 for what I had. I did not know at that time that this stock had gone down and was only valued at about $1,800. I think that is all they got for it, or all they represented to us, I think a little less than $1,800 was represented to us. I don't know whether that concern has now gone out of business or not. In the conversation about the mortgage there was no talk about a bank, as I call it; the bank had not sprung into existence then—I don't know—let me see when the mortgage was—yes, I think the bank had sprung into existence, because I was anxious to put in more money than what we could raise, and that was the reason why. In answer to your question about whether I took that mortgage over to a broker

(Testimony of Mrs. Emily A. Beans.)

in Oakland, and whether I recall to whom I took it,—I did not do it. Mr. Kassmir attended to the whole thing, and all I had to do was to go to Mr. Robinson's office and sign up the papers, and then the broker in Oakland came to me and gave me a little book and showed me how much interest I had to pay every month, and that interest had to be paid every month until paid off. Mr. Robinson had nothing to do with me at all in regard to that mortgage personally, about what I was going to do, or anything about it; he simply made up the paper, or had them made up. He knew what was going to be done with the money; there was talk there that I was putting a mortgage on my home so as to buy more stock in the company. I did not say a moment ago that he knew nothing about this; he could not very well help knowing because it was all talked over in his office, but he had nothing to say about it. He did not try to influence me in any way. I had been in his office before; I had never seen him much; I was not well [355] acquainted with him; it was what you might call a most casual acquaintance. I don't think Mr. Randolph was present in the Hobart Building; he might have been but I don't recall it. When the money was turned over to the company I don't know; I don't recall having any further conversation with Mr. Randolph either as to the character or amount of stock that I was going to buy; I may have; I don't recall; I may have talked it over with him. It was only a few days between the time I signed the mortgage

(Testimony of Mrs. Emily A. Beans.)

and the time that I finally got the money from the mortgage and turned it over to the Cromwell Simon Company. No, I have not been talking this matter over very considerably with Miss Durham; once in a while we talked over dates; but we have not hashed it over very thoroughly. We talked it over some, what we could, with Mr. Madeira; we have only seen Mr. Madeira a little while at a time, a couple of times. Mr. Madeira was over to our place only twice. The first time he was there maybe an hour and a half, or maybe two hours, I could not say. The second time not so long. He did not talk to us about these respective parties as he said he could use some of it. He did not tell us about a letter which I should write along about October, 1927, to Randolph. I did not write a letter to Mr. Randolph at his suggestion about October, 1927, to Mr. Randolph. I talked the matter over with Mr. Sweeney slightly, about fifteen or twenty minutes I should judge. I could not tell you anything that Mr. Madeira told me about the bank over in Reno as I recall it, if I tried, I do not think I could repeat a single thing. I think he told us he saw our certificate over there, I have not thought anything about whether I could repeat anything in my conversation with Mr. Madeira or in regard to this bank over there. I would have to try and think it up. He gave us to understand that we were duped and that there was nothing there, that he could not find anything. That was not the first time

(Testimony of Mrs. Emily A. Beans.)

I became incensed or had any hard feeling toward Mr. Randolph. [356]

Mr. Madeira came to see me in January, 1928, the latter part, I believe. I did not, before that, write Mr. Randolph, in a very cordial tone. I wrote him a severe letter; I got a long answer. I still have that letter and answer. I think I have a copy of the letter in the house. The letter that I refer to is dated in October, 1927. I think there must be three sheets. We wrote sometimes to try and help us out with Mr. Kassmir. He wrote back that he would try to do it, and he really did try to do it. He sometimes telegraphed to him and told him to send down a check. We saw him. He did not tell us he came up to help us out in any way he could. He came up and we talked Mr. Kassmir over—that we were beholden to Mr. Kassmir for our help, and he told us he did not know anything about Kassmir—he did not even know how his business was. He had heard it was very flourishing but did not know, he had not been up there. He said he was in Los Angeles and Mr. Kassmir was in Seattle. I cannot go back and tell what was said in the other conversation with Mr. Madeira. Perhaps, Mr. Madeira can tell you when he gets around to it. That was in January and I will confess I don't know what was said—exactly. I was sick in bed for two months with "flu" in January and February. My memory has not served me quite as well when I was sick.

(Testimony of Mrs. Emily A. Beans.)

Cross-examination.

(By Mr. McDONALD for Defendant Kassmir.)

Mrs. BEANS.—On the occasion of my trip to Cromwell Simon Company in relation to the stock of A. W. Scott, it was not Mr. Cromwell Simon I discussed this matter with, but Mr. Kassmir. I am quite positive of that. Mr. Simon was in the room, I was introduced to him. He sat in the room for a little while, but as I remember it, he got up and went out and Mr. Kassmir was the one that explained to me all about the method and how well they could do by me—how much money they could make for me if I would [357] only stay with them. He said, "We'll buy the stocks," and that we should pay for it on the partial payment plan, so I bought one hundred shares. After that, I think it was in January, Mr. Kassmir came to my house one evening and told me I had been very badly duped by Cromwell Simon. He promised time and time again that he would personally try and pay me back everything that I lost. He has not sent me a number of checks, two or three checks. He promised to pay me back, but he has not done it. He has never sent me any money since that time.

Redirect Examination.

(By Mr. SWEENEY.)

I was 78 years old last January, 23d. Mr. Madeira's two visits were about ten days apart. I wrote other letters to Mr. Randolph in addition to

(Testimony of Mrs. Emily A. Beans.)
the letter of October 26, 1927, prior to that time and received answers to them. Those letters were always more or less opened by myself and my niece in one another's presence. Our mail was common. Aside from the two payments made after I had signed the contracts with Mr. Kassmir and Mr. Randolph and another, three payments of the company up in Reno, of the bank in Reno, I did not get a cent from Randolph and Kassmir. I don't think I saw Cromwell Simon but three times in the times I was at the office. He did not seem inclined to talk to me at all.

EXCEPTION No. 15.

Mr. McGEE.—I move to strike from the record, on the grounds previously stated, first, that this lady, according to her testimony, parted with whatever value she parted with not on the basis of any letters received by her through the mail, but on the oral representations of Randolph and Kassmir, and that there is nothing in the testimony of this witness pointing to the allegation of the indictment that the mails were used to defraud; whether she was defrauded actually, or not, is not a question for this Court. The question before this Court and jury is whether [358] she was defrauded through the use of the mails, and, according to the testimony of this witness, she was not defrauded by the use of the mails, but if she was defrauded at all it was by the oral representation made by Kassmir and Randolph; on the further ground, if your Honor

(Testimony of Charles Burke.)

please, in so far as the defendant Goodwin is concerned, that the testimony is hearsay, immaterial, irrelevant, and incompetent.

Mr. McMILLAN.—As to the defendant Robinson, we join in that motion in all respects.

Mr. HARRIS.—And the defendant Randolph joins in it, except as to the third specification.

The COURT.—It will be overruled.

Mr. HARRIS.—Exception.

Mr. McMILLAN.—Exception.

TESTIMONY OF CHARLES BURKE, FOR THE UNITED STATES.

CHARLES BURKE, produced as a witness on behalf of the United States, having been first duly sworn, testified in substance as follows:

Direct Examination.

(By Mr. SWEENEY.)

I am a Deputy County Clerk of the City and County of San Francisco. There has been filed in that office a certificate of Harry Kassmir and Cromwell Simon for doing business under fictitious name. (Here there was offered in evidence a certificate of copartnership of Cromwell Simon Company, dated February 24, 1925, and it was stipulated that it be read into the record, and that the original document be returned to the authorities of City and County of San Francisco.) (At this time the witness was also shown a certified copy of the decree of the Superior Court of the State of Califor-

(Testimony of Charles Burke.)

nia in and for the County of San [359] Francisco in Cromwell Simon and Co. vs. Edward Doherty, Commissioner of Corporations, said decree being entered in open court on the 17th day of February, 1925, and indorsed, filed Sept. 25, 1925. There was no objection on the part of any of the defendants and the document was marked, U. S. Exhibit 1.) Said U. S. Exhibit 1, being as follows: Certified Copy of Decree, Cromwell Simon & Co. vs. Daughtery, etc., No. 158735, Superior Court, S. F., Cal.; the original exhibit being before this Honorable Court by stipulation and order.

TESTIMONY OF E. H. BEEMER, FOR THE UNITED STATES.

E. H. BEEMER, produced as a witness on behalf of the United States, having been first duly sworn, testified in substance as follows:

Direct Examination.

(By Mr. SWEENEY.)

My occupation is that of County Clerk of Washoe County, Nevada. (At this time there was exhibited to the witness documents which he identified as the original record in the office of the County Clerk of Washoe County, Nevada, of the Articles of Incorporation of Cromwell & Co., and an exemplified copy of the original record. The exemplified copy was offered as United States Exhibit 5 for Identification, and so marked.) The minutes of the meetings of that corporation are not filed in the County Clerk's office up in Nevada.

TESTIMONY OF HOWARD C. ELLIS, FOR THE UNITED STATES.

HOWARD C. ELLIS, produced as a witness on behalf of the United States, having been first duly sworn, testified in substance as follows:

Direct Examination.

(By Mr. SWEENEY.)

I am an attorney at law, and specifically, Assistant Commissioner of Corporations of the State of California. I have been in that office for four years and have been Assistant for about a year. [360]

(Here the witness identified a document as an application for broker's certificate from Cromwell Simon, which was admitted and marked U. S. Exhibit 2.)

A broker's license was issued and shortly after that, February 18, 1925.

(Here witness was shown a file which he identified as part of the files of Cromwell Simon in the records of the Corporation State Department, and specifically, the broker's certificate or license issued February 19, 1925, and the revocation of the same, which was admitted in evidence, and marked, U. S. Exhibit 3.)

(Here the witness is also shown documents which he identified as part of the records of the State Corporation, consisting of an agent's application blank filled out for agent's license. There being

(Testimony of Howard C. Ellis.)

no objection, the document was admitted in evidence and marked U. S. Exhibit 4.)

(Here witness was also shown a document which he identified as the application of Cromwell Simon and Harry Kassmir, doing business under the fictitious name of Cromwell Simon & Company for a broker's certificate, dated April 7, and received in the Sacramento office, April 13, 1925, and a certificate issued April 13, 1925, which was admitted in evidence and marked U. S. Exhibit 5.)

(Here was exhibited a document to the witness which he identified as an order of the Corporation Commissioner granting Cromwell Simon & Co., a broker's license, which was admitted in evidence and marked, U. S. Exhibit 5.)

EXCEPTION No. 16.

Mr. SWEENEY.—Q. I will show you this and ask you if you can identify it.

A. I recognize it.

Mr. SWEENEY.—You are familiar with these, Mr. Harris?

Mr. HARRIS.—Those are the agent's licenses? [361]

Mr. SWEENEY.—Yes, issued under the Cromwell Simon brokerage license.

Mr. HARRIS.—Yes, I have seen them.

Mr. SWEENEY.—At this time I want to offer in evidence as one exhibit the application of J. W. Randolph for authority to act as broker's agent, and the order, both of which are dated April 20,

(Testimony of Howard C. Ellis.)

1925, also a similar document for Orton E. Goodwin, J. Edward McClintock and W. Claude Owen.

Mr. McMILLAN.—On behalf of the defendant Robinson, I object to the introduction of these documents in evidence on the ground that there has been no showing whatever concerning his knowledge of the matters therein contained, they are in no way binding upon him, and, therefore, are incompetent as to him.

The COURT.—The objection is overruled.

Mr. McMILLAN.—Exception.

EXCEPTION No. 17.

Mr. SWEENEY.—Q. I will show you this, here, and ask you if you can identify that, Mr. Ellis (exhibiting to witness a document purporting to be a revocation of the license of Cromwell Simon & Co.).

A. I recognize that, yes.

Mr. SWEENEY.—At this time I wish to introduce this particular document in evidence. I think you gentlemen are familiar with it.

Mr. McMILLAN.—Objected to on behalf of the defendant Robinson on the ground that so far as he is concerned the proper foundation has not been laid, that it is hearsay, and incompetent.

Mr. HARRIS.—The same objection on behalf of the defendant Randolph, and the further objection that it is in no way binding upon him.

Mr. SWEENEY.—We will connect it up later on.

Mr. HARRIS.—Do I understand it is part of the case to [362] have the license revoked?

Mr. SWEENEY.—No, it is not to have it revoked. It is part of this case to have it continued in force.

Mr. HARRIS.—The point I make is that no implication should be transferred to my client by the fact that Cromwell Simon & Company had their license revoked, and, therefore, it is immaterial, irrelevant, and incompetent as to him, and no foundation has been laid as to him.

The COURT.—I do not believe there has been any foundation laid to place it in evidence, even if it was revoked. There is nothing to indicate they had notice of it. I think it can be received only for identification.

Mr. SWEENEY.—If a part of the scheme is to maintain the license of Cromwell Simon any effort made by them to retain that license is admissible in evidence, it is part of the *res gestae,* it is part of the whole scheme to defraud.

The COURT.—Do I understand that you hope to show that it was revoked, and that there was an attempt made later—

Mr. SWEENEY.—Not only that, but after that date—

The COURT.—Just a minute. Answer my question. Do I understand then you want to introduce the fact, if it is a fact, that there was a revocation, and subsequently they tried to have it set aside. Is that what you are trying to show?

(Testimony of Howard C. Ellis.)

Mr. SWEENEY.—Yes. I will ask Mr. Ellis a question.

Q. Mr. Ellis, was a copy of that mailed to the applicants? A. It was mailed.

The COURT.—Did you personally mail it?

A. I personally saw to it; I was present when it was drawn up and saw that it was sent out, saw it signed.

Mr. McGEE.—I still object to that, and ask that the answer be stricken out on the ground that this witness did not himself either mail the letter or personally see it mailed. [363]

A. I did not chase after the letter, no, but I saw it go out of the office in the United States mail.

The COURT.—Q. You saw it placed in the hands of the postman?

A. In the hands of our mailing clerk to be deposited with the postman, yes.

Mr. McGEE.—I urge the objection, and ask that the answer be stricken out, on the ground that he cannot personally say he saw the letter mailed.

The COURT.—I think you are anticipating something. It has not been offered yet.

Mr. SWEENEY.—At this time I would like to offer in evidence this particular document, which you, Gentlemen, are probably familiar with.

Mr. McGEE.—I make an objection on the same grounds previously stated.

The COURT.—I will sustain the objection. I cannot see the bearing of this document upon any possible issue in this case, unless it was brought

to the knowledge of individuals involved. I do not think you have built up circumstantially, or by direct evidence, yet, that it was. [364]

Mr. SWEENEY.—If it was mailed to the people interested, the presumption is it was received.

The COURT.—If it had been dropped into the postoffice box, I would concede your position.

Mr. SWEENEY.—If it had been mailed in the ordinary course of business conducted by a big organization or a big concern, it would be.

Mr. McGEE.—If you were attempting to prove the mailing of notices at the time of the probate of a will, or something of that kind, you would have to come in with an affidavit of the person mailing the notice; that is the only way you could prove it, by the person who mailed it. I submit that it is not admissible in evidence for two reasons previously stated, and on the further ground that no foundation has been laid that it was ever brought to the attention of the defendants, or of either of them.

The COURT.—I will sustain the objection. It will be received for identification.

Mr. SWEENEY.—Is the reason that it is not received in evidence because the Government has not yet proved it was properly mailed?

The COURT.—It has not been proved that it was properly mailed, or that it had come to the attention of the defendants.

Mr. SWEENEY.—In the record so far we have a decree by Judge Deasy setting aside the injunc-

(Testimony of Howard C. Ellis.)

tion granted against the Corporation Commissioner for revoking their license, so we have already covered in the record that it must have been brought to their attention.

Mr. HARRIS.—It is still not brought to the attention of Randolph.

Mr. McGEE.—Nor brought to the attention of the defendant [365] Goodwin.

The COURT.—I think that is a good point. The objections heretofore made will be overruled, and it will be received in evidence.

Mr. McGEE.—Is it in evidence for all purposes against all the defendants—against the defendant Goodwin?

The COURT.—The Court has not made any exception in the ruling.

Mr. McGEE.—We note an exception.

Mr. HARRIS.—We note an exception as to the defendant Randolph.

Mr. McMILLAN.—And we note an exception as to the defendant Robinson.

(The document was marked U. S. Exhibit 7.)

EXCEPTION No. 18.

Mr. SWEENEY.—Q. Mr. Ellis, you personally held this hearing on which this particular decree was predicated?

A. I personally conducted the hearing.

Q. Who was present at that hearing of the defendants, if you know?

(Testimony of Howard C. Ellis.)

A. Cromwell Simon and Harry M. Kassmir.

Q. At that hearing which one of the defendants took the stand?

A. Cromwell Simon took the stand.

Q. Were certain exhibits offered by him in evidence at that time? A. There were.

Q. At this time I will show this letter and ask you if you can identify it. A. I do.

Q. When did you see that for the first time?

A. That was filed at that hearing.

Q. By whom?

A. March, 1925, by Cromwell Simon & Co.

Mr. SWEENEY.—At this time I will ask that this be introduced in evidence and if it is accepted I will read it later. [366]

Mr. McGEE.—Objected to on behalf of the defendant Goodwin on the ground that it is not binding on him, immaterial, irrelevant and incompetent, hearsay, secondary evidence, it not having been shown that Goodwin knew anything about its contents, no foundation has been laid.

Mr. SWEENEY.—It purports to be a financial statement of that concern on a particular date, filed by Cromwell Simon, in the presence of Harry M. Kassmir, at a hearing held by the Corporation Commissioner.

Mr. McMILLAN.—Held at what date?

Mr. SWEENEY.—On the date that Mr. Ellis testified to.

Mr. HARRIS.—It appears to be a summary of certain books, and nothing is shown that the de-

(Testimony of Howard C. Ellis.)

fendant whom I represent, or any of the other defendants, had particular access to those books, or had the care or control of those books. That was exactly the point upon which the Doble Case was reversed by the Supreme Court. They attempted to introduce a *résumé* of certain books just as they are doing here, and Judge Preston at that time held that by implication you could not hold a person responsible in that sort of fashion. If your Honor please, I have the decision here.

The COURT.—I understand that, but I do not believe that it would support the defendants in this case.

Q. Who presented that at the hearing in behalf of the Cromwell Simon Company?

A. It was presented by both sides; it was stipulated by Cromwell Simon and Harry Kassmir that it might be used by both sides.

Q. Who spoke for the company?

A. Cromwell Simon, in that case.

Mr. HARRIS.—If your Honor please, with your Honor's permission I move to strike out the statement of the witness in response to your Honor's question on the ground that it is his [367] conclusion, and not the best evidence, the record of the hearing being the best evidence.

The COURT.—Overruled.

Mr. McMILLAN.—We desire to adopt the objection of Mr. Harris, on behalf of the defendant Robinson.

(Testimony of Howard C. Ellis.)

Mr. SWEENEY.—At this time I offer it in evidence but I will not read it until later on.

Mr. HARRIS.—Exception.

Mr. McMILLAN.—May we have this understanding, that when one counsel notes an exception that the other counsel do not have to note an exception.

The COURT.—I will make no further statement, I think it is very well understood by counsel what has been said. I have explained it two or three times, and you are only going over the same thing.

Mr. McMILLAN.—I simply do not want to tax your Honor's patience. [368]

The exhibits which you have offered in evidence are Exhibits 1 to 6 introduced in the hearing held by the Corporation Department, conducted by me, and representing purchase agreements of Cromwell Simon Co., with different parties whose names appear on these agreements. These were produced at the hearing, some of them by Harry Kassmir, and some by Cromwell Simon. They were read in the presence of both. These are McClintock agreements, and not of different parties. There were other agreements introduced, but these six do not represent any of them. They were produced by Harry M. Kassmir.

EXCEPTION No. 19.

Mr. SWEENEY.—At this time I offer these purchase agreements in evidence, signed by L. M. McClintock.

Mr. McMILLAN.—On behalf of the defendant Robinson, the offer is objected to on the ground the proper foundation has not been laid as to him, incompetent, irrelevant, not within the issues of this case, and hearsay as to him; and these purported agreements deal with a time when, as the defendant Robinson, under no possible theory of this case, would he be bound by these documents, or any of them.

Mr. HARRIS.—On behalf of the defendant Randolph, I adopt the objection of the defendant Robinson.

The COURT.—You offer these as showing the activities of these men at that time?

Mr. SWEENEY.—Yes, and that they were subsequently adopted by Mr. Robinson when he entered into the scheme.

The COURT.—You also believe that the activities of this firm were for the purpose of this design?

Mr. SWEENEY.—It was the scheme, part of the scheme.

Mr. McMILLAN.—I ask that the statement of the District Attorney, when he subsequently entered the scheme, be stricken out, as there is no proof whatever he ever entered into any scheme. [369]

The COURT.—The statements of counsel are not evidence, no matter what counsel may say, unless it is stipulated to. I will overrule the objection.

Mr. McMILLAN.—Note an exception.

Mr. HARRIS.—Note an exception.

(Testimony of Howard C. Ellis.)

(The purchase agreements are marked U. S. Exhibit 9.)

During that hearing I interrogated Mr. Cromwell Simon concerning these purchase agreements.

EXCEPTION No. 20.

Mr. SWEENEY.—Q. Purchase agreement No. 1, "Herewith find money order or check for, as collateral, to apply as first payment on 100 shares of General Motors, Market, 100 shares of Studebaker, Market,"—I will ask you if you asked Mr. Cromwell Simon whether those stocks were bought, the date of that being February 25, 1925.

Mr. HARRIS.—We object to that as leading and suggestive, irrelevant, and immaterial, and not binding upon the defendant Randolph.

Mr. McMILLAN.—The defendant Robinson joins in the objection.

The COURT.—Overruled.

Mr. HARRIS.—Exception.

Mr. McMILLAN.—Exception.

Mr. SWEENEY.—Q. Do you have a record of that hearing in your hand?

A. I have.

Q. You have refreshed your memory from that record? A. I have.

Q. What was the answer of Cromwell Simon with reference to the purchase agreements?

A. That they had not purchased them.

Mr. HARRIS.—That is objected to as immaterial, irrelevant, and incompetent, hearsay, as far

(Testimony of Howard C. Ellis.)

as the witness is concerned, because there is no foundation laid showing that he made that memorandum, himself, and he testifies he refreshed his recollection from that [370] memorandum, which is pure hearsay.

Mr. McMILLAN.—The same objection on behalf of the defendant Robinson.

The COURT.—Q. You have that in your hand. You just refreshed your memory?

A. I have not refreshed my memory recently from this, but I recall and have read the transcript, however, in connection with this case.

The COURT.—The objection is overruled.

Mr. HARRIS.—Exception.

Mr. McMILLAN.—Exception.

Mr. SWEENEY.—Q. You have an independent recollection of this transaction, also?

A. I have.

Q. I will show you a purchase agreement marked "3," which says, "Herewith find money order or check to apply as first payment on the following, 100 shares Marland Oil, market." Do you recall asking Mr. Cromwell Simon at that time whether those shares were bought?

Mr. HARRIS. — We also object on the same grounds on behalf of the defendant Robinson.

Mr. McMILLAN.—The same objection on behalf of defendant Robinson.

The COURT.—Overruled.

Mr. HARRIS.—Exception.

Mr. McMILLAN.—Exception.

(Testimony of Howard C. Ellis.)

A. Yes, we interrogated Cromwell Simon with regard to each one of these six, and to each one he replied that they had not purchased the security.

Mr. SWEENEY. — Q. Then the next one is March 6, 100 shares of Radio Corporation of America at 63¼, the next is March 11, 1925, 100 shares of Union Oil of California at market, 40, the next is March 13, 100 shares of Standard N. J. market, at 42¼, the next one [371] is March 13, also, 100 shares Pacific Oil market, at 58¼.

Mr. McMILLAN.—The defendant Robinson objects to them on all of the grounds previously stated.

The COURT.—The objection is overruled.

Mr. McMILLAN.—Exception.

Mr. HARRIS.—Those are all of Exhibit 9?

Mr. SWEENEY.—Yes.

Mr. Robinson was in the employ of the Corporation Department. He resigned as of June 4, 1925. The date of the hearing was March, 1925; it was continued from time to time, I do not recall the exact date. Cromwell Simon Co. had their offices originally in the Mills Building, and subsequently in 1403 Hobart Building.

EXCEPTION No. 21.

Q. Did Mr. Simon, at the date of that hearing, tell how much money he had taken out as his part of the profits of Cromwell Simon & Co.?

Mr. HARRIS.—Objected to on behalf of the defendant Randolph as leading and suggestive, and the grounds stated in the other objection. (Imma-

(Testimony of Howard C. Ellis.)

terial, irrelevant, and incompetent, and not binding upon him.)

Mr. SWEENEY.—The statement I was about to make is this, the contention of the Government is that the attempt of Cromwell Simon and Mr. Kassmir to continue their license in effect by the opposition to this hearing is a part of the scheme, because we state in the indictment that the obtaining and acting of Cromwell Simon & Co. under a broker's license is part of the scheme.

Mr. HARRIS.—Our contention is that in order to do that the Government does not have to lead as adept a witness as this, that he can relate what was said and done without suggestions from counsel.

The COURT.—The objection is overruled. [372]

Mr. HARRIS.—Exception.

Mr. McMILLAN.—Exception.

A. Mr. Cromwell Simon did state the amount of money he had taken out of the business, yes.

Mr. SWEENEY.—Q. What was that?

A. If my recollection is right it was $2,800.

Q. How much had Mr. Kassmir taken out?

A. A like amount.

Mr. SWEENEY.—Q. How much did Mr. Simon say Mr. Kassmir had taken out?

Mr. McMILLAN.—The same objection, on the further ground that at the date this transaction took place they were strangers, so far as the defendant Robinson is concerned.

The COURT.—At this hearing?

Mr. SWEENEY.—Yes, this statement was made

(Testimony of Howard C. Ellis.)

by Cromwell Simon and Harry Kassmir at that time, and the whole thing is a part of the scheme.

Mr. HARRIS.—I would like to call your Honor's attention respectfully to this, that the foundation has not been laid for this testimony, because the Government has not shown when this scheme terminated, or conspiracy, as counsel sees fit to call it.

The COURT.—I believe that is a matter of connecting up.

Mr. HARRIS.—Then may we reserve a motion to strike this out?

The COURT.—Yes. The objection will be overruled.

Mr. HARRIS.—Exception.

Mr. McMILLAN.—On behalf of the defendant Robinson, may we have the benefit of the ruling reserving the right to make a motion to strike out?

The COURT.—Yes.

Mr. McMILLAN.—Exception.

A. He said that a like amount had been taken out by Mr. Kassmir. [373]

Mr. SWEENEY.—Q. I will ask you if you can identify that?

A. I can.

EXCEPTION No. 22.

Mr. SWEENEY.—At this time I want to offer in evidence the application for broker's certificate of J. W. Randolph, doing business as Charles Wesley Company.

Mr. McGEE.—As far as the defendant Goodwin

(Testimony of Howard C. Ellis.)

is concerned, we object to that as immaterial, irrelevant, and incompetent, hearsay, on the further ground that it is not responsive to any of the allegations of the indictment; there is nothing said in this indictment about Wesley Company. The only names they mention are Cromwell Simon & Co., and Cromwell & Co. There is nothing said about the Wesley Company, and we object to it as not responsive to any allegations of the indictment.

Mr. McMILLAN.—The defendant Robinson joins in the objection, and also that the proper foundation has not been laid.

Mr. SWEENEY.—The position of the Government is this, that when Cromwell Simon Company ceased to function, they started in business as Charles Wesley Company, and continued to do business.

Mr. HARRIS.—Q. Where was that?

Mr. SWEENEY.—In Los Angeles.

Mr. McGEE.—But this crime is charged in the Northern District of California.

Mr. SWEENEY. — The scheme, however, Mr. McGee, might go through the whole country.

Mr. McGEE.—I object to that as immaterial, irrelevant, and incompetent, not responsive to any of the allegations in the indictment.

The COURT.—In other words, you are going to follow it up further than Cromwell Simon & Company?

Mr. SWEENEY.—Yes, we are going to show that they conducted business as Charles Wesley Com-

pany, operating from 1403 Hobart Building, where we are going to leave the Cromwell Simon Company, [374] and there on the same date that they were put out of business by the Superior Court of the City and County of San Francisco, they started in business as Charles Wesley Company.

Mr. McGEE.—This indictment charges that within the State and Northern District of California, Southern Division, the crime of using the mails to defraud was committed. They are going down to Los Angeles, now, which is another district, not in this district, and from there, according to the letter that they have attached to the indictment, they are going up to Seattle. In other words, any place they find Simon or Kassmir doing business under any name, in this district or some other district, they are going to trail him around all through the dealings; I submit, if your Honor please, that the indictment charges this crime was committed in the Northern District of California, and if they subsequently organized a business down in Los Angeles, or Seattle, it is not material.

The COURT.—The whole question is whether it is one common scheme, and the question is to make the connection. I agree with counsel if the connection is not made to show it is all one scheme or course of conduct on the part of the defendants, if the evidence does not connect it up it will not be proper. I will overrule the objection.

Mr. McGEE.—Note an exception.

Mr. HARRIS.—Note an exception.

(Testimony of Howard C. Ellis.)

Mr. McMILLAN.—Note an exception.

(The document was marked U. S. Exhibit 10.)

Mr. SWEENEY.—Q. Do you recognize this, Mr. Ellis?

A. I recognize it as part of our special documents.

Q. And they are what?

A. They are agent's applications by different individuals to represent the Charles Wesley Company, McClintock, Owen and McCaffrey. [375]

Mr. SWEENEY.—Q. Mr. Ellis, with reference to the handwriting in the application of W. Claude Owen, I will ask you if you can identify it.

A. I can.

Q. Whose writing is it?

A. The writing of Mr. Robinson.

Mr. SWEENEY.—That is all from this witness at this time.

Cross-examination.

(By Mr. HARRIS.)

I have not the entire file of the Wesley Company here. (Mr. Sweeney announces that he has the file and Mr. Harris asks him to produce it so that witness may refer to it.) Without examining file do not know length of time Wesley Company continued to have a broker's license. This plan of business that Cromwell Simon & Co. were engaged in was not exactly known as the partial payment plan; they called it the Cromwell Simon Partial Payment Plan of business. We put them out of business just on account of the type of business they were

(Testimony of Howard C. Ellis.)

conducting. I was not permitting other partial pay houses to operate at that time. Corbin & Company were operating at that time on the partial payment plan, but immediately after were put out of business up here by me. At that time the Commissioner did permit them to have a license. As far as I know, at the time information came to me that the partial payment plan of business was operating in San Francisco, there were, upon investigation, two, there were Cromwell Simon & Co., J. H. Corbin & Co., and subsequently, almost immediately thereafter John C. Ship Company. There probably were others.

Q. And, to some extent, there have been partial pay houses running right along, that is, a more limited number, but the plan has been in use: Is that right? A. I am not sure about that.

Q. You are not in a position to say that the City Bond & Finance Company, with which Mr. Paul Rinehart is connected, is not now operating as a partial paying plan? [376]

Mr. SWEENEY.—I wish to interpose an objection to the question as immaterial, irrelevant, and incompetent, and not within the scope of the direct examination. I had Mr. Ellis identify certain records, I had him tell the story of the Cromwell Simon Company hearing before him down in the State Corporation Department. Outside of that, I cannot see where the question is relevant.

The COURT.—What do you hope to prove by this?

Mr. HARRIS.—He has indicated by his testimony with reference to the hearing to revoke Cromwell Simon Co.'s license that the plan and scheme, in itself, was inherently bad, as counsel for the Government attempted to indicate to the jury, that it was a false and fraudulent scheme. Now, I am trying to show by this witness that the scheme, itself, was a partial paying proposition, was recognized by the Corporation Department, and that if anything was wrong with the conduct of an individual business it did not necessarily make the entire operations fraudulent.

The COURT.—Is that the contention, that the plan is fraudulent?

Mr. SWEENEY.—As I said in my opening statement, I said this plan was the vehicle upon which this fraud was perpetrated, it is a part of the scheme, it is the very vehicle by which it was perpetrated.

Mr. HARRIS.—Is it counsel's contention that the partial payment plan is fraudulent in itself? If not, I can restrict my examination very much.

Mr. SWEENEY.—I do not stipulate to anything like that.

Mr. HARRIS.—I am asking what your contention is.

Mr. SWEENEY.—It may not be inherently fraudulent, but the Government contends that it was used as a vehicle for this scheme by the Cromwell Simon Co.

The COURT.—I have no objection to your covering that phase [377] of it, if you want to, if

(Testimony of Howard C. Ellis.)

you believe from the statement of the District Attorney it bears directly upon the issues.

Mr. HARRIS.—I think counsel for the Government has made it pretty plain it is not their particular contention that this scheme, of itself, was inherently fraudulent.

Mr. SWEENEY.—Do not misunderstand me, Mr. Harris, to say that I think the partial payment plan scheme is all right.

Mr. HARRIS.—I will leave that for the jury to determine, rather than to put the implication to them.

Q. Mr. Ellis, this file that I hand you is what?

A. A portion of the file of the Charles Wesley Company.

Q. What portion is it?

A. Agents' applications.

Q. And each one of these pages you hold in your hand, or each two of these pages constitutes one agent's license: Is that right?

A. I also notice that there are some agents' renewal applications here; a renewal application is only one sheet; but other than that they constitute the regular form used by the Corporation Department for agents' applications and renewals.

Q. Starting from what time, Mr. Ellis?

A. September, 1925.

Q. September, 1925, to what date?

A. April, 1927—April 4.

Q. April 4, 1927? A. Yes.

(Testimony of Howard C. Ellis.)

Q. Now, will you just take your file and refer to it and tell me how long the Charles Wesley Company continued to have a broker's license?

Mr. SWEENEY.—Mr. Harris, I do not like to interject, but can you limit that question to how long they had a license as long as they were operating on the partial payment plan?

Mr. HARRIS.—No, I want to show that Charles Wesley Co. were in business up to a certain [378] period, and had never had their license revoked.

A. A part of the file is now in evidence, that is, the original license of 1925, that is not here. I have the license for the year 1926, and the license for the year 1927. That license, by its terms, expired the 31st of December, unless sooner revoked.

Q. Will you refer to the file and see if it is not a fact, Mr. Ellis, that in the year 1928, some time in the spring, the application for license for 1928 was voluntarily withdrawn by Mr. Randolph?

Mr. SWEENEY.—I want to interpose an objection that it is immaterial, irrelevant and incompetent; it might just happen that Mr. Randolph was engaged in other business down there, and unless the question is limited to the Charles Wesley Company, doing business under the partial payment plan, or doing business under the license issued to him in evidence, it is immaterial, irrelevant, and incompetent. I have no objection to Mr. Harris putting in all of the agents' applications that he can find in the record, provided those agents were doing business under the broker's certificate that was is-

(Testimony of Howard C. Ellis.)

sued to Mr. Randolph when he said that his office was in 1403 Hobart Building.

Mr. HARRIS. — Mr. Randolph has never said that his office was at 1403 Hobart Building.

Mr. SWEENEY.—The application file which is in evidence states so.

Mr. HARRIS.—I do not think so. I want to show that this was merely a temporary address, and will show by Mr. Ellis that offices were open in Los Angeles, and that the man is in perfectly good standing in Los Angeles.

The COURT.—Do you see any objection to that?

Mr. SWEENEY.—No. As I say, the application file shows Charles Wesley Company was doing business, or, rather, Charles W. Randolph's brokerage license gives [379] the place of his address as 1403 Hobart Building.

Mr. HARRIS.—That address is changed.

Mr. SWEENEY.—There are many agents' certificates there of the Charles Wesley Company which were issued when he was no longer engaged in the partial payment plan. I want to limit it to this particular certificate here.

Mr. HARRIS.—Counsel has not stated when the partial payment plan was abandoned, nor has this witness testified to it. He has left the record in a state that Wesley Company is engaged in the partial payment plan.

The COURT.—Do you know when the partial payment plan ceased?

A. I do not.

(Testimony of Howard C. Ellis.)

The COURT.—Nor do you, Mr. Sweeney?

Mr. SWEENEY.—Yes, I do, but I do not think it is proper for me to develop it at this time unless you request me.

The COURT.—The proof will cover any field to which they may have gone.

Mr. SWEENEY.—If Mr. Harris wishes to ask the question, I think I might get it in.

Mr. HARRIS.—I have nothing to conceal.

The COURT.—Proceed.

In answer to your question, does your file show that J. W. Randolph, doing business as Charles Wesley Company, ever had his license revoked by the State Corporation Department for any reason? —the file for 1928 of J. W. Randolph, doing business as Charles Wesley Company, does not appear here. I have had dealings in connection with that license all during the year 1928, and I have been in contact with the Los Angeles office in connection with it. I do not recall the date of his withdrawal of his license; and I have no recollection like that, —that his license was absolutely ready for issuance, and Mr. Randolph, himself, refused to take it, because he had been indicted in this case. I had no correspondence of that kind and was not in touch to that extent with the Los Angeles office. No, I could not say that is not a fact, that that was the reason presented to your office by Mr. Randolph, that he would not accept his license in 1928. Estimating how many various agents were employed by Wesley & Company during the three or

(Testimony of Howard C. Ellis.)

four [380] years that they existed, I should say, roughly speaking, about fifty. Referring to the application of McClintock of October, 1925, which is handed me, I did not personally issue this license; but I recognize the signature, the form of the document, and the document itself. It is noted that he says that he worked for Cromwell Simon Company before as an agent, and despite that fact our office issued the license. At the time Charles Wesley got a license, in other words Jack Randolph got a license for Charles Wesley Company, there was no knowledge then in the Sacramento office, [381] where he got his license, of his trouble with the San Francisco office. I was not in the Sacramento office at that time, but I am familiar with the entire case by an examination of the records. The records will show that Jack Randolph had an agent's license for Cromwell Simon Co., and that this license was part of our records. The files here apparently do not show whether in 1925 our office made an examination of the books and records of the Charles Wesley Company, in December, 1925.

(By Mr. McMILLAN.)

Samuel H. Robinson, one of the defendants in this case, was employed in the State Corporation Department as a Deputy, which had to do with the granting of licenses to sell stock and securities in the State of California. We were both deputies together in the office; I would not say I was his superior. We were employed in similar capacities. He was there about two years, and left the employ-

(Testimony of Howard C. Ellis.)

ment of the State Corporation Department around about June 4, 1925. The records show that the hearing on the notice for the revocation of the license of Cromwell Simon & Co. was conducted in the office of the State Corporation Department May 5, 8, and 11, 1925. The audit was made March 25, 1925, and shortly thereafter a notice was prepared and sent to the brokerage concern, but as to the exact date I could not say; it will undoubtedly appear in the file under the proper date. Mr. Robinson did not appear as an attorney for Kassmir or Cromwell Simon at the hearing; at that time he was in the department as an employee. And, so far as I know, the persons named at the time of said hearing were utter strangers to him.

Mr. McGEE.—If your Honor please, this is cross-examination on behalf of the defendant Goodwin.

Q. When was the application of Orton E. Goodwin for a salesman's license made?

Mr. SWEENEY.—That is objected to as immaterial, irrelevant and incompetent, and not the best evidence, because it is already in [382] evidence.

Mr. McGEE.—Q. Running through these records which are in evidence, what is the date of Orton E. Goodwin's application for a license?

A. March 10, 1925.

Q. Have you any record of Orton Goodwin ever having applied for a license prior to that time?

A. I would have to examine the records of the

(Testimony of Howard C. Ellis.)

Sacramento office to find out that. In other words, he might have had a license prior to that time.

Q. Tell us about this Sacramento office. Isn't that the head office?

A. The Sacramento office is the head office.

Q. You say you had an office in San Francisco, and an office in Los Angeles, but the Sacramento office has copies of all of the files, has it not?

A. By law, the originals are all required to be kept in Sacramento.

Q. To be kept in Sacramento? A. Yes.

Q. Then the Corporation Commissioner, or his deputies in Sacramento, are advised as to everything being done by his deputies in California, whether it be in the San Francisco office, or the Los Angeles office?

A. In theory they ought to be.

Q. I did not ask you that. He is advised by reason of the original records being kept there: Isn't that correct? A. When they get there he is, yes.

Q. Now, so far as you know, Orton E. Goodwin never had a license as a broker or a salesman before this time?

A. His application would indicate that he had.

Q. That he had in California?

A. Yes. You asked me whether I knew. I don't know.

Q. You don't know anything about it?

A. His application indicates he had, because he says "Refer to file of licenses by J. H. Corbin Co. Los Angeles."

(Testimony of Howard C. Ellis.)

Q. Before a license is issued to a salesman, or an agent, as you call them, to work for someone else, there is a time elapses from the time the application is filed until the license is granted: Is that correct? A. There is now, yes.

Q. Was there then? A. Unfortunately, no.

Mr. McGEE.—I move to strike out the word "unfortunately," and I would ask the Court to please admonish the witness to answer the question.

Q. I just want you to answer the question, if you please. [383] At that time was there any time elapsed between the filing and the granting of the license? A. The license shows two days.

Q. How long did that license to Orton E. Goodwin remain in force?

A. By its terms, it would remain in force until December 31, 1925, unless sooner revoked.

Q. Was it revoked?

A. So far as I know it has not been.

Q. Look at your records: Have you got any application, or have you any license granted to Orton E. Goodwin, as an agent for Wesley & Company?

Mr. SWEENEY.—The Government will stipulate there is none.

Mr. McGEE.—All right, that is stipulated, there is no license that was ever granted to Orton E. Goodwin as an agent of the Wesley Company. I think that is all.

Mr. McDONALD.—Q. At the time of this hearing, Mr. Ellis, you were very much, and I suppose

(Testimony of Howard C. Ellis.)

are still, opposed to the partial payment plan as it is called?

A. If I might answer that question in my own way, I will give you my views.

Q. I think that question can be answered "Yes" or "No."

A. It cannot. The partial payment plan of business is different with every individual viewpoint.

Q. However, the department has allowed certain firms to operate under the partial payment plan?

A. It is conceivable that there is a type of partial payment plan that would not be inherently vicious.

Q. This plan operated by Cromwell Simon Co. was largely the same plan operated by J. H. Corbin Co., was it not? A. I think not.

Q. Are you familiar with the plan operated by J. H. Corbin Co.? A. To some degree, yes.

Q. Have you studied it in connection with the plan operated by Cromwell Simon?

A. Not particularly, no.

Q. Do you know that the form of contract is practically, if not absolutely word for word, the same?

A. I was so informed by the members of Cromwell Simon Company.

Q. You largely brought this hearing on account of certain information you had as to the reputation of Mr. Cromwell Simon, didn't you?

A. That was connected with it, but not the entire basis for the hearing.

(Testimony of Howard C. Ellis.)

Q. During this hearing [384] you introduced evidence as to Mr. Cromwell Simon's dealings in other parts of the country, did you not?

A. In other brokerage concerns.

Q. You spoke of the amount of money withdrawn by Mr. Kassmir and Mr. Cromwell Simon. How much did you say that was? To the best of my knowledge, my opinion is it was about $2,800; it might have been $2,500.

Q. As a matter of fact, it was less than $2,500?

A. I could not say. I could tell you by looking at that record.

Q. As a matter of fact, it was $2,429.84, and out of that the sum of $43.84 was a charge not for salaries. You are familiar with the brokerage business, are you not? A. Yes.

Q. Do you consider that the sum of $250 a week is an exorbitant salary fora manager of a brokerage concern?

Mr. SWEENEY.—That is objected to as immaterial, irrelevant and incompetent, the particular objection being that $2,484 up to the time of that hearing was $250 a week.

Mr. McDONALD.—Q. This represents, Mr. Ellis, the withdrawal of Cromwell Simon and Harry Kassmir from February 27, 1925, to April 25, 1925; is that correct? A. Are those the dates given?

Q. Those are the dates in the transcript.

A. Then they are correct.

Q. Now, I will ask you if you consider the sum

(Testimony of Howard C. Ellis.)

of $250 a week an exorbitant salary for the manager of a brokerage concern?

Mr. SWEENEY.—The same objection.

The COURT.—I will allow the question.

Mr. McDONALD.—Will you answer it?

A. Yes and no. Now, by way of explanation, where a brokerage concern is not using its customers' money, but is taking profit, $250 week would not be considered an outrageous salary, but where the organizers of the concern did not put in any more than $42 or $45 of their own money, but were using their clients' money to pay themselves salaries with, and are not buying these securities, I consider it excessive.

Q. You say they are not buying securities. Was it not testified to by Mr. Cromwell Simon, and shown by the auditor, that a great deal of these securities had been purchased? [385]

A. Some of the securities had been purchased, yes.

Mr. McDONALD.—That is all.

Redirect Examination.

Mr. SWEENEY.—Q. Mr. Ellis, there are a considerable number of applications there. Do you know of your own knowledge that this particular application that you have in your hand were applications of the Charles Wesley Company doing business under the application that was filed in San Francisco, 1925?

A. That big bundle of agent's applications you speak about, you have reference to now?

(Testimony of Howard C. Ellis.)

Q. Yes.

A. Very few of them are for the year 1925, and are in connection with that 1925 license; you must remember that this license there represents the license issued for the latter part of 1925, all of the year 1926, and all of the year 1927.

Redirect Examination.

(By Mr. SWEENEY.)

I don't know what particular character of business Mr. Randolph was engaged in in 1926. These applications or certificates, because they happened to be in the file, do not necessarily mean that they are applications which were granted under the broker's license [386] of Mr. J. W. Randolph, doing business at 1403 Hobart Building. The sum of $43.85, referred to by me under Mr. McDonald's cross-examination, represents the cash capital contribution on the part of Cromwell Simon and Harry Kassmir in their brokerage business. Mr. Robinson prosecuted the appeal from the decision of the corporation commissioner to the Superior Court of the City and County of San Francisco, as an attorney.

Recross-examination.

(By Mr. McMILLAN.)

With reference to when that appeal was prosecuted, an injunction was gotten out immediately after notice of our decision of the revocation, and the revocation will be the best evidence of that; I do not recall offhand what that was; it seems to

(Testimony of Howard C. Ellis.)

me it was June 6th, and the injunction was gotten out staying us from further interfering with Cromwell Simon Company, and it was submitted on briefs, and the decision came down I believe September 8th. Mr. Robinson left our office in June; he was a practicing attorney; and he represented them as an attorney at law in the prosecution of said appeal.

(By Mr. HARRIS.)

Mr. Randolph was not, as far as I remember and believe, ever present at the hearing in the department that I have been speaking about.

Q. Mr. Ellis, I call your attention to a document appearing in your file, headed "Order requiring keeping of certain records"; is that the ordinary regulations of your office that those brokers who have had licenses say from 1926 on be required to keep specific records of stock sold and purchased?

A. We were requiring this record of stock in 1925 and 1926, I believe.

Q. Now, the one that you have in your hand is particularly directed to Jack W. Randolph, doing business as Charles Wesley Company, is it not?

A. That is [387] correct.

Q. It is dated at what time?

A. January 20, 1926.

Q. It requires that every 60 days he shall present to you a report showing what stock he has purchased, and keeping his books in the manner required by your office? A. That is correct.

Q. Does your record show in any place that he

(Testimony of Howard C. Ellis.)

did not comply with your instructions in that regard?

Mr. SWEENEY.—I suggest that he be given the file and be given an opportunity to look over it.

Mr. HARRIS.—I am perfectly willing that the witness take his time, and he can come back.

Mr. SWEENEY.—I suggest that he be given the file and permitted to look over it, and give that particular information that you inquire about.

The COURT.—It is going to require investigation of the record. Is there any other question that would involve that same examination?

Mr. HARRIS.—I do not think so. There is just one more question I have in mind, and then he can come back afterward if he wants to.

The licenses that are issued are not continuing licenses; they terminate as of the 31st of each year in which they are issued and then the broker makes a request for a renewal. That is what happened with Mr. Randolph. The record shows that he conducted his business from several addresses, for instance, 720 Board of Trade Building, Los Angeles, December 24, 1926; and from December 24, 1926 to the time he gave up his license he was in the Board of Trade Building in Los Angeles. [388]

TESTIMONY OF V. H. PARKS, FOR THE UNITED STATES.

V. H. PARKS, a witness produced on behalf of the United States, being first duly sworn, testified in substance, as follows:

Direct Examination.

(By Mr. SWEENEY.)

During the year 1925, probably during the months of February to September, I was bookkeeper and cashier for Cromwell & Simon Co. After this I was employed in the same capacity for Charles Wesley Company.

(Here witness identifies signature of defendant Orton E. Goodwin, to letter dated April 22, 1925, which letter was marked, U. S. Exhibit 6 for Identification.)

(Here witness identifies signature of J. W. Randolph to letter addressed to Mr. G. A. Johnson, dated July 7, 1925, which letter is marked U. S. Exhibit 7 for Identification.)

(Here witness identifies his own handwriting, or signature, which was marked U. S. Exhibit 8 for Identification.)

HOWARD C. ELLIS, FOR THE UNITED STATES (RECALLED).

HOWARD C. ELLIS, a witness recalled on behalf of the United States, testified in substance as follows:

In answer to the questions asked me at this

(Testimony of Howard C. Ellis.)

morning's session whether or not the Charles Wesley record or file shows that the reports required by the Corporation Commission were made, my answer is that the file does not show that.

Cross-examination.

(By Mr. HARRIS.)

I think the files show that one investigation was made by the Corporation Department; it might show more. [389]

Redirect Examination.

(By Mr. SWEENEY.)

The nature of the investigation was—they had a hearing. On January 18, 1926. As a result of the hearing the Charles Wesley Company agreed as a precedent to receiving a license for 1926 that they would discontinue, directly or indirectly, the idea of carrying on a partial payment plan business.

Recross-examination.

(By Mr. HARRIS.)

As far as the records show, they did discontinue and kept their word; I have nothing to the contrary. They were issued their license again in 1927.

TESTIMONY OF V. A. PARKS (RESUMED).

(By Mr. SWEENEY.)

(Witness is here shown letter dated June 24, 1925, addressed to Mr. S. Tiger, identifies the sig-

(Testimony of V. A. Parks.)

nature of Orton E. Goodwin thereto, and letter is marked U. S. Exhibit 9 for Identification.)

(Witness is here shown letter dated June 30, 1925, addressed to Mrs. Annie G. Tiger, signed Orton E. Goodwin, identifies said signature and letter is marked U. S. Exhibit 10 for Identification.)

(Witness is here shown letter addressed to Mrs. Annie G. Tiger, dated July 2, 1925, signed Orton E. Goodwin, identifies said signature and said letter is marked U. S. Exhibit 11 for Identification.)

(Witness is here shown letter dated September 5, 1925, addressed to Mrs. Annie G. Tiger and signed by J. W. Randolph, identifies the signature of J. W. Randolph and said letter is marked U. S. Exhibit 12 for Identification.) [390]

(Witness is here shown letter dated April 26, 1925, addressed to Mr. Ernest Hipp, signed by Orton E. Goodwin, identifies said signature, and said letter is here marked U. S. Exhibit 13 for Identification.)

(Witness is here shown letter dated June 29, 1925, addressed to Ernest Hipp, signed Orton E. Goodwin, identifies the signature of said Orton E. Goodwin, and said letter is marked U. S. Exhibit 14 for Identification.)

(Witness is here shown letters addressed to Mrs. B. M. Ogier dated April 25 and June 13, 1925, signed Orton E. Goodwin, and identifies the signatures as those of said Orton E. Goodwin, and said letters are marked U. S. Exhibits 15 and 16 for Identification.)

(Testimony of V. A. Parks.)

(Witness is here shown letter addressed to Miss Clara Oliver, dated October 9, 1925, signed Harry M. Kassmir, which signature witness identifies and counsel for said Kassmir stipulates is the signature of Kassmir, and said letter is marked U. S. Exhibit 17 for Identification.)

(Witness is here shown a letter dated October 28, 1925, addressed to Miss Clara Oliver, 1696 Green Street, identifies signature as that of J. W. Randolph, and said letter is here marked U. S. Exhibit 18 for Identification.)

(Witness is here shown letter addressed to Mr. W. Allen, 1717 Ellis Street, dated September 11, 1925, signed by J. W. Randolph, identifies the signature as that of J. W. Randolph, and letter is marked U. S. Exhibit 19 for Identification.)

(Witness is here shown letter addressed to W. F. Allen, 1717 Ellis Street, dated September 10, 1925, signed by J. W. Randolph, identifies signature as that of J. W. Randolph, and letter marked U. S. Exhibit 20 for Identification.)

Q. Just look at all of those signatures and see if you can identify them.

A. I would say they were all the signature of [391] J. W. Randolph.

Q. Do you know that they are? A. Yes.

Mr. SWEENEY.—This purports to be dated November 5, 1925, a letter addressed to W. F. Allen, 1717 Ellis Street, San Francisco, by J. W. Randolph, and I ask that it be marked Government's exhibit next in order, for identification.

(Testimony of V. A. Parks.)

(The document was marked U. S. Exhibit 21 for Identification.)

The next one is dated October 13, 1925, addressed to Miss Mary Esther Durham, 5838 Birch Court, Oakland, California, signed by J. W. Randolph, and ask that it be marked Government's exhibit next in order for identification.

(The document was marked U. S. Exhibit 22 for Identification.)

The next one is dated October 28, 1925, addressed to Miss Mary Esther Durham, 5838 Birch Court, Oakland, California, signed by J. W. Randolph, and I ask that it be marked Government's exhibit for identification next in order.

(The document was marked U. S. Exhibit 23 for Identification.)

The next one is dated February 2, 1926, addressed to Miss Mary Esther Durham, 5838 Birch Court, Oakland, California, signed by J. W. Randolph, and I ask that it be marked Government's exhibit for identification next in order.

(The document was marked U. S. Exhibit 24 for Identification.)

Q. I will show you a letter purporting to be signed by Harry Kassmir, and ask you if you can identify that signature. A. Yes.

Q. That is the signature of Harry M. Kassmir?

A. Yes.

Mr. SWEENEY.—This purports to be a letter dated [392] February 19, 1926, addressed to Miss Mary Esther Durham, 5838 Birch Court,

(Testimony of V. A. Parks.)

Oakland, California, and signed by Harry Kassmir, and ask that it be marked U. S. exhibit next in order, for identification.

(The document was marked U. S. Exhibit 25 for Identification.)

Q. I ask if you can identify that signature.

A. That is also the signature of Harry M. Kassmir.

Mr. SWEENEY.—It purports to be a letter addressed to Miss Mary Esther Durham, 5838 Birch Court, dated March 15, 1926, signed by Harry M. Kassmir, and I ask that it be marked U. S. exhibit next in order, for identification.

(The document was marked U. S. Exhibit 26 for Identification.)

Q. Are you familiar with that signature, Mr. Parks?

A. Yes, that is the signature of J. W. Randolph.

Mr. SWEENEY.—It purports to be a letter dated June 26, 1926, addressed to Mrs. Beans, and signed by J. W. Randolph, and I ask that it be marked U. S. exhibit next in order for identification.

(The document was marked U. S. Exhibit 27 for Identification.)

Q. Are you familiar with that signature?

A. Yes, that is the signature of Harry Kassmir.

Mr. SWEENEY.—That purports to be a letter dated July 7, 1926, addressed to Miss Mary Esther Durham, 5838 Birch Court, Oakland, California, and signed by Harry Kassmir, and ask that it be

(Testimony of V. A. Parks.)

marked U. S. exhibit next in order for identification.

(The document was marked U. S. Exhibit 28 for Identification.)

Q. Are you familiar with that signature?

A. Yes, that is the same signature, Harry Kassmir.

Mr. SWEENEY.—It purports to be a letter addressed to Mrs. Beans and Miss Durham, dated March 8, 1927, and signed by Harry [393] Kassmir, and I ask that it be marked U. S. exhibit next in order for identification.

(The document was marked U. S. Exhibit 29 for Identification.)

TESTIMONY OF MARY CHRISTENSEN, FOR THE UNITED STATES.

MARY CHRISTENSEN, a witness produced on behalf of the United States, being first duly sworn, testified in substance as follows:

Direct Examination.

(By Mr. SWEENEY.)

During the summer and autumn of 1925 I was stenographer for Mr. Robinson, whose office was at 1403 Hobart Building. I was not employed by the Cromwell Simon Co. I am familiar with the signature which you show me. It is mine.

(Witness is here shown letter addressed to Mr. Gustave A. Johnson, Postoffice Box 53, Chualar, California, signed by Cromwell, Simon & Co., by

(Testimony of Mary Christensen.)

Harry Kassmir, states that the signature is in her handwriting, and said letter was marked U. S. Exhibit 30 for Identification.)

(Witness is here shown a letter addressed to J. A. Barden, Attorney at Law, at Salinas, California, dated May 13, 1926, signed by Cromwell Simon Co., by Harry M. Kassmir, states that the signature is in her handwriting, and said letter was marked U. S. Exhibit 31 for Identification.)

EXCEPTION No. 23.

Mr. McDONALD.—If your Honor please, we object to this as immaterial, irrelevant, and incompetent, and a privileged communication, something occurring in the relationship between attorney and client while this young lady was employed at the office.

The COURT.—What are you objecting to?

Mr. McDONALD.—The introduction of this paper in evidence. [394]

The COURT.—It has not been offered.

Mr. McDONALD.—I want to ask certain questions concerning the signature. He has asked questions concerning the signature and the writing of this letter, to which we object.

Mr. SWEENEY.—No, I asked her to identify the signature of H. M. Kassmir.

Mr. McDONALD.—We object to that on the same ground.

The COURT.—I don't know whether it is pertinent to the issues, or not.

(Testimony of Mary Christensen.)

Mr. SWEENEY.—I will offer this for identification at this time.

(The document was marked U. S. Exhibit 31 for Identification.)

Q. I will ask you if you are familiar with that signature. A. Yes, that is mine.

Q. Whose signature is that? A. Mine.

Mr. SWEENEY.—This purports to be a letter addressed to Mrs. Annie Tiger, dated May 14, 1926, signed by Samuel H. Robinson. I offer it for identification.

(The document was marked U. S. Exhibit 32 for Identification.)

Q. I will show you that signature and ask you if you are familiar with that.

A. I think it is Mr. Robinson's.

Q. Are you sure?

A. It looks like his writing.

The COURT.—Q. Are you familiar with his writing? A. Yes.

Q. Do you believe it is? A. Yes.

Mr. SWEENEY.—Q. You believe it is his writing?

A. Yes.

Mr. SWEENEY.—This is a letter dated July 25, 1925, to Mr. Leroy F. Pike, City Attorney, Reno, Nevada, and signed by Samuel H. Robinson.

Mr. HARRIS.—This letter apparently goes to a point in [395] the indictment, and might affect my client, and I would ask permission, with the purpose of objecting on the ground of privilege,

(Testimony of Mary Christensen.)

as to how she got the information that that was Mr. Robinson's signature.

The COURT.—I do not see the purpose of it at this time, because, as far as I can see, all that is being done is laying a foundation for further identification of certain signatures, before they can be received. At that time I presume you can question on that very point.

Mr. HARRIS.—I can very plainly see the district attorney's point on this; he is having her identify a signature now, and then he will bring in somebody that will say that he received that letter. There could be no question of privilege raised at that time, so it must be raised now or waived, before the witness goes off the stand.

The COURT.—This examination cannot be broken up into as many parts as exhibits are offered now. You can make a notation of that exhibit and inquire as to it, as to her knowledge.

Mr. SWEENEY.—Q. I will show you that signature and ask you if you can identify that.

A. Yes, that is mine.

Mr. SWEENEY.—This purports to be a letter addressed to Leroy F. Pike, August 6, 1925, and signed by Samuel H. Robinson, and ask that it be marked U. S. Exhibit 34 for Identification.

(The document was marked U. S. Exhibit 34 for Identification.)

Q. And the same with these two.

A. These are not mine.

Q. Are you familiar with the handwriting?

(Testimony of Mary Christensen.)

A. Yes.

Q. Whose handwriting is it?

A. Mr. Robinson's.

Mr. SWEENEY.—At this time I wish to have marked for identification a letter addressed to Leroy F. Pike, Reno, Nevada, dated August 31, 1925, and signed by Samuel H. Robinson. [396]

(The document was marked U. S. Exhibit 35 for Identification.)

The next is a letter addressed to Leroy F. Pike, dated September 18, 1925, and signed by Samuel H. Robinson, and ask that it be marked U. S. Exhibit 36 for Identification.

(The document was marked U. S. Exhibit 36 for Identification.)

Mr. SWEENEY.—That is all.

Mr. McGEE.—Might I ask the witness a few questions?

The COURT.—Proceed.

Cross-examination.

Mr. McGEE.—Q. Between what dates were you employed by Samuel H. Robinson as his stenographer?

A. The latter part of 1925, until about August of 1926.

Q. During all of that period he was engaged in private practice as an attorney at law?

Mr. SWEENEY.—That is objected to as immaterial, irrelevant, and incompetent, and calling for the conclusion of this witness.

(Testimony of Mary Christensen.)

Mr. McGEE.—Whether she was employed as a stenographer to him as a lawyer is a question for this Court to learn in order that we may subsequently raise an objection. We move to strike this witness' testimony out on the ground that it is a privileged communication.

The COURT.—As far as the explanation of counsel is concerned, I think the objection should be sustained.

Mr. McGEE.—Q. Whence did you obtain the information as to whose signature that was?

A. Which signature?

The COURT.—How do you know that that is his signature?

Mr. McGEE.—Q. How do you know that that is his signature?

A. From seeing it at various times, it looks like his writing.

Q. Under what circumstances did you see him write, and where? [397] A. Signing letters.

The COURT.—Q. You saw him sign his signature?

A. Yes.

Q. You have seen the letters after he signed them? A. Yes.

Mr. McGEE.—Q. Did you see that in the course of your employment?

A. Yes.

Q. All the information with reference to the facts you have testified to was gained by you while you

(Testimony of Mary Christensen.)

were in the employ of Samuel H. Robinson: Is that correct? A. Yes.

Mr. McGEE.—I think that is all. I think it is in the record all ready that Samuel H. Robinson is an attorney at law.

Mr. SWEENEY.—Do I understand Mr McGee to say that the matter of knowledge of a signature acquired by a stenographer is a matter of confidential communication?

The COURT.—The only thing Mr. McGee announced, as far as the record shows, is that Mr. Robinson was an attorney at law.

Mr. McGEE.—And any information which this lady gained, which she just testified to was acquired by her during the time and in the course of her employment as a stenographer with Samuel H. Robinson.

The COURT.—Counsel, in his own opinion, is summing up what evidence has been introduced; that is the only effect of that statement.

Mr. McGEE.—If there is no other question by counsel I am going to make a motion.

Mr. HARRIS.—I would like to ask a few questions.

Mr. McGEE.—Go ahead.

Mr. HARRIS.—Q. While you were working for Mr. Robinson, what did you do, stenographic work?

A. Yes.

Q. And secretarial work?

A. Well, dictation, transcribing, answered the telephone.

(Testimony of Mary Christensen.)

Q. And did you see what character of work Mr. Robinson was doing? [398] What I mean to ask by that is, was he in the automobile business, or candy business, or what was he doing?

A. An attorney, of course.

Q. Did he go to court? A. Yes.

Q. Write up legal documents? A. Yes.

Q. During the whole time that you were there?

A. Yes.

Q. That was his business? A. Yes.

Q. You were his clerk and his secretary?

A. Yes.

Mr. HARRIS.—Now, if your Honor please, I make the motion that the testimony be stricken out on the ground that it is a privileged communication.

The COURT.—Q. You also wrote personal letters outside of the business letters while you were there? A. Not that I remember.

Q. You never wrote a personal letter?

A. I do not just remember any personal letters.

Q. They always related to business? A. Yes.

Q. He never wrote a letter that did not relate to some client? A. Not that I remember.

Q. The entire time that you were there?

A. No.

Mr. McGEE.—The defendant Goodwin joins in the motion to strike out the testimony.

Mr. McDONALD.—The defendant Kassmir joins in the motion.

Mr. McMILLAN.—And the defendant Robinson.

The COURT.—I think you ought to make some statement for the record, Mr. Sweeney.

Mr. SWEENEY.—I don't understand what the particular motion is.

Mr. HARRIS.—The motion is to strike out the testimony given by this witness from the record, on the ground it is a confidential communication.

The COURT.—On the ground it was procured in a confidential [399] relationship.

Mr. SWEENEY.—As I understand the rule, not all information that is acquired while a person is a clerk or a secretary is confidential; for instance, the matter of signature is a matter in which a person might be able to raise the curtain of confidential communication and use it as a screen for committing crime. The privilege, itself, is a matter of the client. If Mr. Robinson's clients were here, or something of that character, complaining as to it—

The COURT.—The matter of obtaining information as to a man's signature, in my opinion, is not a matter of confidential communication. The objection will be overruled.

Mr. HARRIS.—Exception.

Mr. McGEE.—Exception.

Mr. McMILLAN.—Exception.

Mr. McDONALD.—Exception.

Mr. HARRIS.—I desire to answer counsel's statement. I just want to call your Honor's attention to the section covering that very point, Section 1881 of the Code of Civil Procedure (reading).

(Testimony of Leticia W. McClintock.)

The COURT.—It is not the opinion of the Court that that pertains to knowledge acquired of a person's handwriting. The ruling will stand.

Mr. HARRIS.—Note an exception.

Mr. McMILLAN.—Note an exception.

Mr. McDONALD.—Note an exception.

Mr. McGEE.—Note an exception.

TESTIMONY OF LETICIA W. McCLINTOCK, FOR THE UNITED STATES.

LETICIA W. McCLINTOCK, a witness produced on behalf of the United States, being first duly sworn, testified in substance as follows: [400]

Direct Examination.

(By Mr. SWEENEY.)

During the year 1925 I resided at 3151 California Street. The signature on that letter you have asked me to identify is the signature of Harry Kassmir.

(Here a letter addressed to Miss Clara Oliver, 1696 Green Street, dated May 6, 1927, signed Harry Kassmir, was marked U. S. Exhibit 37 for Identification.)

(Here witness is shown two letters, and identifies the signatures as the signatures of Harry Kassmir. One is a letter addressed to Miss Clara Oliver, dated March 15, 1926, signed by Harry Kassmir and is marked U. S. Exhibit 38 for Identification. The other letter is addressed to Mr. John J. Allen, dated March 8, 1927, Seattle, Washington, and

(Testimony of Leticia W. McClintock.)

signed by Harry M. Kassmir, and is marked U. S. Exhibit 39 for Identification.

(Witness is here shown letter addressed to Mr. Ernest C. Hipp, dated April 1, 1925, signed by Cromwell Simon Company, E. Hoffman, marked in the corner "OEG/H." and is asked if she knew Eleanor Hoffman. Witness testifies that she knew Eleanor Hoffman, that she was a stenographer employed during February, March and April of 1925 for Cromwell Simon Company in the Mills Building; that the signature of said letter is that of said Eleanor Hoffman. The letter was marked U. S. Exhibit 40 for Identification.)

I know the defendants Harry M. Kassmir, Orton Goodwin, J. W. Randolph and Samuel H. Robinson. Met Mr. Kassmir for the first time probably the end of 1924, as salesman for J. H. Corbin & Co. I had been doing business with J. H. Corbin & Co. at that time. I recall when Mr. Kassmir left the employ of J. H. Corbin & Co.; had business transactions with him at that time; it was just a continuation. He contemplated going into business for himself, he asked me if I would like to see him improve his position, and I [401] said certainly, and then he brought up Mr. Cromwell Simon. I am not sure about the date. It might have been in January, 1925. At that time I had securities in the custody or control of J. H. Corbin & Co. which I turned over to Kassmir as collateral for the stock that he was buying for me. The purchase agreements, which you now show me, I signed them. I

(Testimony of Leticia W. McClintock.)

never did business with anybody but Kassmir. I bought 100 shares of General Motors, at least he was supposed to buy them for me. I gave as collateral 20 shares of P. G. & E. A copy of the contract that I signed was not given to me. Under the second purchase agreement I bought 100 shares of Marland Oil, and gave as collateral security 12 Owl Drug Preferred. Then I bought 100 Radio Corporation of America shares, and put up as collateral 10 shares of Standard Oil of N. J. and 10 of Great Western Power. The next purchase agreement, I bought 100 shares of Union Oil of California, and the next purchase agreement, 100 shares of Standard Oil of New Jersey. The latter purchase agreement was March 13, 1925, and I put up as collateral or security 10 shares of Great Western Power. And the next one is 10 shares of Tennessee Electric Company. The date of the next purchase agreement was March 13, 100 shares of Pacific Oil, and the amount of collateral put up by me was 13 shares of Anglo London Paris National Bank. I never got any of the stock that I ordered, and I never got returned to me any of the stock or security that I put up as collateral. I had so many conversations with Mr. Kassmir immediately after the formation of the Cromwell Simon Company, I have forgotten any one in particular. The character of business he said he was going into was to purchase stock on the installment plan. He said Cromwell Simon had put in $200,000. Later on, I was called down to the Corporation Commissioner at a hear-

(Testimony of Leticia W. McClintock.)

ing. The contract dated May 15, 1925, which you are showing me, I have read it so many times I know it by heart. I signed this contract after the hearing and it says here why I signed it. It was to help him out [402] before the Corporation Department.

EXCEPTION No. 24.

Mr. SWEENEY.—If your Honor please, I will offer this in evidence as Government's Exhibit next in order.

The COURT.—For identification, or in evidence?

Mr. SWEENEY.—In evidence, your Honor.

Mr. HARRIS.—That is objected to, as far as the defendant Randolph is concerned as being in no way binding upon him, a hearsay transaction between strangers to him, immaterial, irrelevant and incompetent.

Mr. McMILLAN.—The defendant Robinson joins in that objection.

The COURT.—The objection will be overruled.

Mr. SWEENEY.—It is part of the scheme, that is the Government's contention.

The COURT.—It will be received and marked next in order.

Mr. HARRIS.—Exception.

Mr. McMILLAN.—Exception.

(The document was marked U. S. Exhibit 12.)

Mr. SWEENEY.—I will read it. (Reading.) [403]

(Testimony of Leticia W. McClintock.)

EXCEPTION No. 25.

Q. Now, Mrs. McClintock, let me have, please, the circumstances under which this agreement was entered into by you. Let me withdraw that question. I will ask you can you identify that. A. Yes.

Q. What is that? That is your signature, is it not? A. Yes.

Mr. SWEENEY.—I ask that this be introduced in evidence as Government's exhibit next in order.

Mr. HARRIS.—The same objection as made to the last exhibit.

Mr. McMILLAN.—We join in the objection.

The COURT.—The same ruling.

Mr. HARRIS.—Exception.

Mr. McMILLAN.—Exception.

(The document was marked U. S. Exhibit 13.)

Mr. SWEENEY.—Q. Will you please tell the Court and jury the circumstances under which that contract which I read was entered into, and this receipt?

The COURT.—Q. What were the circumstances under which you made this contract and the receipt?

Mr. SWEENEY.—Q. Take them in your hand and tell us in your own language the circumstances.

The COURT.—As to how you came to enter into that—not as to the terms, but how you came to enter into that.

A. Well, he called on me and he wanted me to cancel the certificate that they had issued for the stock I had purchased, or that I thought I had

(Testimony of Leticia W. McClintock.)

purchased—he came to me, and in order to get things straightened out with the Corporation Department he asked me if I would cancel these certificates of purchase, and in return he made out this contract, and I was to receive $200 a month.

Q. In other words, he wanted you to substitute these payments for those certificates?

A. Yes. [404]

Q. Did he tell you why he wanted to do it?

A. Well, to clear his name before the Corporation Department, so he could be helped out in some way, I don't know his exact words.

Mr. SWEENEY.—With reference to that receipt, as I understand, Mrs. McClintock, you gave that receipt?

A. I received nothing for this receipt; he simply made it out and asked me to sign it, and that was also in relation to the Corporation Department.

Q. You gave that receipt to Mr. Kassmir, did you not?

A. I did, but I received nothing in return.

Q. And later on he returned the receipt to you?

A. I think, I am not quite sure, but I think I signed two; I think he kept one and gave me this one.

The COURT.—They were duplicates, however?

A. Yes.

Mr. SWEENEY.—Q. In other words, he still has that receipt from you?

A. I think so, I am not sure about it; I am not so sure, but I think I signed two.

(Testimony of Leticia W. McClintock.)

Q. How many payments of $200 were made to you under the contract?

A. Well, there were quite a few, but I could not say exactly how many.

The COURT.—Q. What do you mean by "quite a few"?

A. I meant I got them for over a year, until he went to Seattle. I never talked business with Mr. Randolph. Mr. Randolph and Mr. Kassmir never called at my house. About September, 1925, or 1926. I am not so sure about that. Mr. Kassmir did speak about his business enterprise in Los Angeles.

EXCEPTION No. 26.

Q. What was the nature of the conversation you had with Mr. Kassmir at that time?

A. He was going down—

Mr. HARRIS.—That is objected to as calling for the conclusion of the witness, what the nature of it was, and no proper [405] foundation has been laid as to the parties present.

Mr. SWEENEY.—Q. Who was present at that conversation, Mrs. McClintock? A. Mr. Kassmir.

Q. What was the conversation, what did Mr. Kassmir say?

Mr. McGEE.—That is objected to on behalf of the defendant Goodwin on the ground that it could not be binding on him, and because he was not connected with the concern in Los Angeles, he had no license connected with any enterprise in Los Angeles, he worked in San Francisco for three months,

and after that had nothing to do with it; we object to any conversation this lady had with anybody about any Los Angeles concern.

Mr. HARRIS.—I would like to add the further objection that it is incompetent, for the reason that it is the alleged relation of a co-conspirator after any conspiracy which might have existed had been consummated. This is now in September, 1925, at a time when this conspiracy terminated.

The COURT.—When do you fix the date that you can put in proof to?

Mr. SWEENEY.—There is an allegation in the indictment that prior to the date of certain letters, and the last letter is somewhere in 1927, if I remember right.

The COURT.—Have you it on record, so that we can know?

Mr. SWEENEY.—Certainly there are letters in 1926.

The COURT.—I am just asking you what date you are contending that you can put in proof for, so that we can fix the date after which the declarations of a defendant will only appertain to himself and not to his associates.

Mr. SWEENEY.—March 8, 1927.

Mr. HARRIS.—Is it my understanding that it is counsel's contention that up to March, 1927—

Mr. SWEENEY.—March 8, 1927. [406]

Mr. HARRIS.—(Continuing.) —the scheme had not until that time been consummated or completed: Is that it?

(Testimony of Leticia W. McClintock.)

Mr. SWEENEY.—It was in operation up to that time.

Mr. HARRIS.—Of course, if counsel connects that up my objection may not be good.

The COURT.—That is why I wanted him to fix the date.

Mr. McGEE.—How, do I understand that there is a date when this conspiracy is supposed to have ceased, or is it still in existence?

Mr. SWEENEY.—It was in existence up to March 8, 1927.

Mr. McGEE.—Not after that?

Mr. SWEENEY.—We do not contend it is in existence now.

The COURT.—Q. This date is what, that you are testifying to?

Mr. SWEENEY.—September, 1925, when he went to Los Angeles.

The COURT.—The objection will be overruled and the question allowed.

Mr. HARRIS.—We will note an exception, and reserve our motion to strike out.

Mr. McMILLAN.—Exception.

Mr. SWEENEY.—Q. What was the nature of the conversation you had with Mr. Kassmir—what was the conversation you had with Mr. Kassmir at that time?

A. That he was going down to Los Angeles to open up a business to get away from the Corporation Department of San Francisco.

Q. Did he say who was going down with him?

(Testimony of Leticia W. McClintock.)

A. Mr. Randolph.

After Mr. Kassmir went to Seattle, which I believe was in March, 1926, I did make a request of him to return to me the stock and money I had invested with him. It might have been in 1925, it might have been in 1927; my confusion is as to whether it was one year ago or two years ago. I had a conversation with Mr. [407] Kassmir concerning some business in Reno. I am mixed up in the year again. It was before he went to Los Angeles. He went in September, but I don't remember the year. The telegram you show me to refresh my recollection,—September 20, 1925, that is not correct. That telegram is from Los Angeles; I received that on Gough Street; that was not in 1925, it was long after the hearing before the Corporation Commissioner that I had this conversation with Mr. Kassmir concerning the Reno business; it must have been along in August, July or August.

EXCEPTION No. 27.

Q. What was the conversation you had at that time with Mr. Kassmir?

Mr. McGEE.—Objected to on behalf of the defendant Goodwin on the ground it is immaterial, irrelevant, and incompetent, hearsay testimony, and not binding on the defendant Goodwin, unless it is shown he was present at the time the conversation took place.

A. It was in August, 1925.

(Testimony of Leticia W. McClintock.)

Mr. HARRIS.—That objection is adopted by the defendant Randolph.

Mr. McMILLAN.—Also by the defendant Robinson.

The COURT.—Overruled.

Mr. McGEE.—Exception.

Mr. HARRIS.—Exception.

Mr. McMILLAN.—Exception.

Mr. SWEENEY.—Q. What was the conversation, as best you remember it.

A. Before he went to Reno, or before he opened the office in Reno?

Q. Before the Reno business.

A. He was just going to open up an office up there.

Q. What was the rest of the conversation?

A. I talked so much with him that I don't remember.

Q. You don't remember at this time?

A. No, not the exact conversation. [408]

Q. Did he say who was going to open up the office with him up in Reno?

Mr. HARRIS.—That is objected to as leading and suggestive. She has already said she does not know.

The COURT.—I will allow the question.

Mr. HARRIS.—Exception.

A. It was supposed to be a continuation of the office in San Francisco.

Mr. McGEE.—I ask that the answer go out as calling for a conclusion, and not responsive.

(Testimony of Leticia W. McClintock.)

The COURT.—Q. Did he say that, or was that your conclusion?

A. Well—

Q. Just answer my question. Did he say that to you, or is that merely your conclusion?

A. No, he said it to me.

The COURT.—The motion is denied.

EXCEPTION No. 28.

Mr. SWEENEY.—Q. I will ask you Mrs. McClintock, if you can identify these letters.

A. Yes.

Q. From whom did you get them?

A. From Harry M. Kassmir.

Q. How did they come to you?

A. Through the mail.

Q. Do you know when you received them, in what year? A. 1926.

Q. 1926? A. Yes.

Mr. SWEENEY.—I would like to have these marked as Government's exhibit next in order, your Honor.

Mr. McGEE.—On behalf of the defendant Goodwin, I object on the ground they are immaterial, irrelevant, and incompetent, and hearsay, as far as Goodwin is concerned, he having severed his connection with this company on the 2d of July, 1925, and all of this transaction having taken place subsequent to that time.

Mr. McMILLAN.—We make the same objection as to the defendant [409] Robinson.

(Testimony of Leticia W. McClintock.)

The COURT.—Overruled.

Mr. McGEE.—Exception.

Mr. McMILLAN.—Exception.

Mr. HARRIS.—Objected to on the ground it is hearsay, incompetent, the proper foundation not having been laid.

The COURT.—I do not know, unless I see the letters, as to whether they do pertain to this matter, at all. (Reading.)

Q. Who is this "Harry"?

A. That is Harry M. Kassmir.

The COURT.—They will be received in evidence. The objection is overruled.

Mr. HARRIS.—Exception.

Mr. McGEE.—Exception.

Mr. McMILLAN.—Exception.

(The document was marked U. S. Exhibit 14.)

(Which original exhibit is before this Honorable Court by stipulation and order.)

Mr. SWEENEY.—Q. Now, Mrs. McClintock, reverting once more to these certificates here, what was your conversation with Mr. Kassmir with reference to the purchase of the stock which you ordered?

A. He purchased it on the installment plan.

Q. Do you know that of your own knowledge?

Mr. McGEE.—I submit, if your Honor please, he has asked the question, and he is bound by the answer of the witness.

The COURT.—I will allow the question.

Mr. McGEE.—Exception.

(Testimony of Leticia W. McClintock.)

Mr. SWEENEY.—Q. Did you understand my question?

The COURT.—Q. Did you take someone's word for it that it was purchased, or do you know yourself, that it was purchased?

A. I did not see it.

Q. In other words, you base your answer on the fact that he told you. A. Yes.

Q. That is all you know about it?

A. Yes, I did not see them.

Mr. SWEENEY.—Q. Did you ever get them?

A. No.

Q. Did you ever get your collateral back?

A. No. [410]

Mr. SWEENEY.—That is all from this witness at this time.

Mr. McMILLAN.—On behalf of the defendant Robinson—

The COURT.—Any further questions?

Mr. McMILLAN.—I have no question.

EXCEPTION No. 29.

Mr. SWEENEY.—That is all from this witness at this time.

The COURT.—Any further questions?

Mr. McMILLAN.—I have no questions.

On behalf of the defendant Robinson we move to strike all of the testimony of this witness upon the following grounds: First, that the testimony as against him is hearsay, the proper foundation has not been laid, and there is no testimony showing

(Testimony of Leticia W. McClintock.)

that he ever authorized or sanctioned, or took any part in any statements or representations that were made, that he ever authorized or sanctioned any of the letters that were sent through the United States mail and the transaction testified to by the witness, so far as he was concerned, was *res inter alios acta*, and there is no testimony showing that he ever made any statement or representation or sanctioned [411] or authorized any representation made in furtherance either of a general plan or scheme to defraud, or of a general plan or scheme in furtherance of fraud to use the United States mails.

The COURT.—The objection is overruled.

Mr. McMILLAN.—Exception.

Mr. HARRIS.—The same objection on behalf of the defendant Randolph.

The COURT.—The same ruling.

Mr. HARRIS.—Exception.

Cross-examination.

(By Mr. McDONALD.)

I was a client of J. H. Corbin & Co. for some time, when Mr. Kassmir was the manager of that company. I was friendly with Mr. Kassmir to a certain extent, that he took an interest in me. He called at my home in a business way. I knew Mr. Cromwell Simon. Met him at my house. He came up to tell me that he was going to go into the brokerage business with Mr. Kassmir. There was nothing said about Mr. Simon's business; it was Mr. Kass-

(Testimony of Leticia W. McClintock.)

mir's business. Mr. Simon did not tell me anything about this. Mr. Kassmir did all the talking. Nothing mentioned about Mr. Simon making a great deal of money in Cast Iron Pipe but Kassmir said that Simon was going to put $200,000 into the business. They started in business in the Mills Building. The understanding was that if he went into business I should transfer my account. At that time I had an account with J. H. Corbin Company and there was some slight indebtedness in that account, some payments that I had not paid up on stock that I was purchasing on the partial payment plan from Corbin & Co. at that time. I don't remember anything being said about Mr. Kassmir taking it up in the firm of Cromwell Simon. The idea was that it was to go on as before and the account was to be transferred over to Cromwell Simon Company. Shortly before the hearing before the Corporation Commission, Mr. Kassmir came to see me but he did not tell me that he was deceived in regard to Mr. Cromwell Simon, that Mr. Cromwell Simon did not have $200,000. He did not tell me that the Corporation Commissioner was questioning their financial responsibility. He said they had to go up there for some reason, but he did not specify just what. It was not until after the hearing that I made the agreement with Mr. Cromwell Simon; Mr. Kassmir sent me $200.00 a month up to the time [412] he went to Seattle. I had to do a lot of talking sometimes to get it, but I finally got it. Yes, I got $200.00 when he went up there,

(Testimony of Leticia W. McClintock.)

but I don't know just how many times it was. That was when I had to razz him to death to get it. Edward McClintock, who has been mentioned here as an agent of the Cromwell Simon Company. is my son.

(By Mr. HARRIS.)

Did not see Mr. Randolph very often. I was around the offices of Cromwell Simon Co. a few times, not many. Saw Mr. Randolph maybe two or three times. Knew Mr. Kassmir and Mr. Simon during all of their business affairs here in San Francisco. Mr. Randolph did not do any business with me directly.

Redirect Examination.

(By Mr. SWEENEY.)

The value of the stock and money I gave to Mr. Kassmir was approximately $14,000, but it is worth a whole lot more today.

Mr. SWEENEY.—I would like to read this letter (reading).

Q. This letter speaks of a check coming to you. Did you ever get it?

A. I could not say. His saying so did not mean I was going to get it.

Mr. SWEENEY.—That is all.

Mr. HARRIS.—I just want to ask one question I possibly overlooked.